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Toward a Charter for the Royal Canadian Mounted Police

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TOWARD A CHARTER

for the

ROYAL CANADIAN MOUNTED POLICE

The Canadian Civil Liberties
Association
1980

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SUBMISSIONS TO - Commission of Inquiry
Concerning
Certain Activities of the
Royal Canadian Mounted Police

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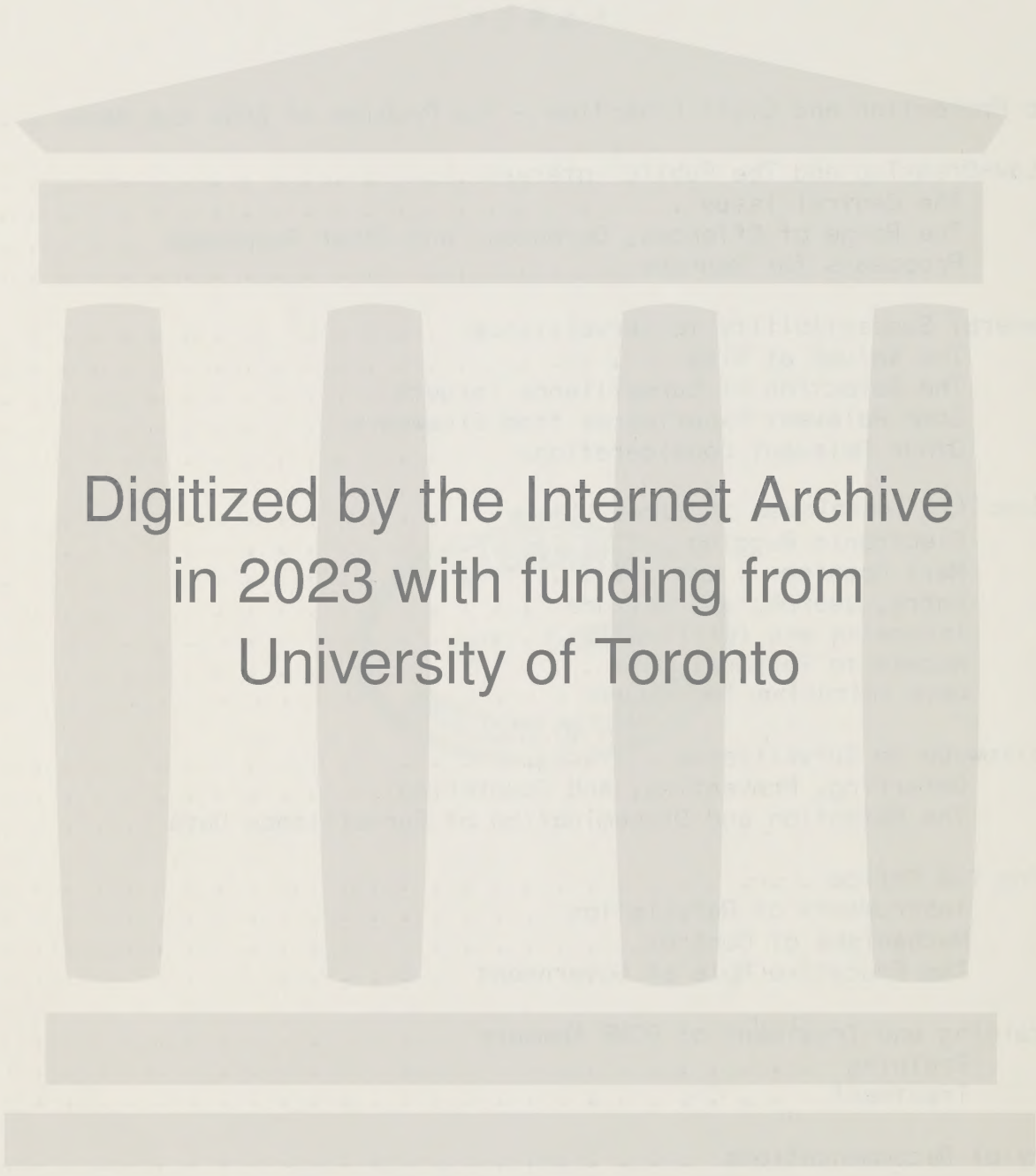
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FOREWORD

In view of the fact that this brief represents our third and probably last formal presentation to the Commission, this would appear to be an appropriate occasion to express certain more general remarks and observations.

In the first place, the Canadian Civil Liberties Association very much appreciates the courtesy and cooperation extended to us on many occasions by the Commission members and staff. Those courtesies substantially reduced the difficulties which were involved in the preparation of our various briefs and presentations. For all of this cooperation, we are very grateful.

In some of the substantive matters, however, we experienced a number of disappointments. Few of our priority proposals have found their way into Commission recommendations. Although it is now more than two years since our first presentation, our most urgent proposal of that occasion remains unfulfilled. Despite scores of unlawful acts by the RCMP which were admitted as far back as October 1977, not a single charge has been laid or disciplinary measure imposed. To our knowledge, the Commission has neither recommended a different course of action nor explained its omission to do so.

We must register also our disappointment in certain aspects of the Commission's first report on security and information. In our view, it breaks too little new ground. It leaves too many "official secrets" untouched and intact. Of particular concern here is the proposed retention of the criminal sanction for disclosing government information bearing upon various aspects of the administration of criminal justice. After setting out a number of specific categories of prohibited disclosure, the recommendation on criminal justice concludes with the rather wide suggestion that it be an offence to reveal government information which "<u>might</u> otherwise be helpful in the commission of criminal offences" (underlining ours). To what extent would this recommendation permit conjecture about mere possibilities to serve as a basis for criminal prosecution? A related issue is recommendation number 18 which would permit in camera trial proceedings for "evidence...prejudicial...to the proper administration of criminal justice". And this in camera provision would be applied apparently to <u>all</u> offences, not just those dealing with unauthorized disclosure. Our concern here is that this recommendation might well reinforce the growing disposition in some

quarters to exclude public scrutiny from an increasing number of trial proceedings having nothing to do with national security.

But, even apart from our disagreements with the report, we were concerned about its failure to explain or substantiate a number of the conclusions it reached. It dismissed much of the American experience, for example, by asserting that U.S. problems with freedom of information are "fairly well documented". While it is true that this matter is the subject of many complaints and controversies in that country, we would point out that the American public record also contains able and vigorous responses to these complaints. Since these issues are so much more fully documented in the United States than in other countries, we believe that any Commission reference to them should attempt to evaluate that documentation.

A word now about the ensuing submissions. No brief from an organization of our size and limited resources could adequately address, within the necessary time constraints, the great bulk of serious issues which comprise the Commission's terms of reference. We have attempted to select what appeared to be the most pressing matters. Since it was primarily the misdeeds of the security service which gave rise to this Commission, our material focuses most heavily on that side of the RCMP's operations. And even within that framework, our main thrust was directed to the investigatory techniques which are most intrusive to civil liberties. Our commentary on regular criminal law enforcement is limited essentially to those issues which are a long standing source of grievance and difficulty.

Few issues in a democratic society can match in importance the attempt to strike a reasonable balance between civil liberties and national security. And few conditions are as central to that exercise as public confidence in the ability of its institutions to meet the challenge. Regrettably, many of the events of the past few years could only have served to erode this public confidence. Police law-breaking, of course, is bad enough. But when that is coupled with government rationalizations for it and a persistent failure to treat it according to the same standards as civilian law-breaking, the erosion of faith has to be considerably exacerbated. It is against this background that we address the foregoing observations and the ensuing recommendations. We hope that the Commision's subsequent reports will help to reverse these unhappy developments.

PUBLIC PROTECTION AND CIVIL LIBERTIES - THE PROBLEM OF ENDS AND MEANS

Ten years ago, the MacKenzie Royal Commission articulated, for its generation and posterity, the reasons why a country like Canada needs a security program. "It is based, primarily", said the Commission, "upon the state's responsibility to protect its secrets from espionage, its information from unauthorized disclosure, its institutions from subversion and its policies from clandestine influence".[1] And then in apparent anticipation of how calmer times might lower our guard, the Commission issued the following admonition.

> "There has been no period in history when attempts at activities of these kinds have not been undertaken; such attempts - successful or unsuccessful - are taking place now, and will undoubtedly continue to take place in one form or another as long as international relationships are based upon the existence of nation states."[2]

The Canadian Civil Liberties Association is unable to impugn either the analysis or the prognosis. Indeed, in some ways Canada and its fellow democracies face even greater dangers today than they did at the time of the McKenzie Report. Since June of 1969, the strongest of the world's democracies, the United States, has suffered the erosion of its credibility through military defeats in Viet Nam, Laos, and Cambodia. In 1973, the Arab countries inflicted a painful oil embargo on the Western nations. By 1979, even the pro Western regime in oil rich Iran was ousted from power and replaced by elements which are hostile to the West. And America's major adversary, the Soviet Union, has reportedly acquired the lead in some areas of military strength and is narrowing the gap in others.

Since June of 1969, the world has also been afflicted by another frightening phenomenon - international terrorism - the IRA, the PLO, the Japanese Red Army, the Italian Red Brigade, the Baader-Meinhof Gang. In some cases, relatively small bands of dedicated fanatics have terrorized whole nations. They have hijacked airplanes, assassinated politicians, planted bombs, seized hostages including children, and perpetrated airport massacres.

Unhappily, the last ten years have also terminated the relative immunity to these phenomena which Canada had previously enjoyed. In October of 1970, the Front de Liberation du Quebec introduced political kidnapping to Canada. First the FLQ terrorists seized British Trade Commissioner James Cross and then Quebec Labour Minister Pierre LaPorte. Two apparently small FLQ cells effectively terrorized the entire country. They forced the Canadian authorities to broadcast a manifesto on the CBC; they precipitated the deployment of special troop contingents to Quebec; and they brought about a massive suspension of civil liberties through the first peace-time invocation of the War Measures Act.

No democrat can look at the last 10 years and be sanguine about the prospects for the survival of democracy in this troubled world. In view of all that has happened and what apparently lies ahead, elementary common sense would require that this country take the necessary precautions "to protect its secrets from espionage, its information from unauthorized disclosure, its institutions from subversion and its policies from clandestine influence".

But such necessary precautions do not and cannot entail a "carte blanche" for the security forces. Democratic societies must be concerned not only with the ends but also with the means. To use an obvious example, the conscience of the Canadian people would be revolted by the use of torture even against their enemies. Torture, of course, is an extreme example. Democratic practice requires many other restraints on the powers of the security and police forces. They cannot, at will, arrest, imprison, enter, search, seize, and snoop. Obviously, such wide police powers could not coexist with the level of civilian freedoms which democracies cherish. In the very nature of things, the more power which is reposed in the police, the less freedom can be enjoyed by the civilians.

Inevitably, however, we are reminded that our enemies are nasty. They cannot effectively be fought by police forces which are confined to the canons of Emily Post. How often have we been told that we have to fight fire with fire? Again, the Canadian Civil Liberties Association cannot deny that such assertions contain elements of truth. To be sure, nasty means may sometimes be needed to fight nasty people.

Yet one can recognize all of this without becoming impaled on the horns of a dilemma. To recognize that the ends sometimes justify the means does not mean that they always do so. Indeed, it is not a question of always or never. Such problems cannot be resolved in the abstract. They must be resolved in the concrete settings in which they arise. Thus the practical question is what ends will justify what means in what fact situations. To address these problems in this way is to accept the never ending exercise of balancing ends and means.

When we apply these principles to our democratic structures, we recognize at once that the choice is not between any or no intrusive police powers. Again, the practical question is which police powers are justified in which situations. The premium which democratic societies accord to civilian freedom requires at this point the introduction of another caveat. No increases should be made on the level of police powers unless their necessity has been demonstrated. Since the beginning of recorded time, malevolent and misguided governments have sought greater powers by asserting various national security interests. Time and again, historians have proved many of these assertions to be fraudulent or erroneous. Indeed, our history books reveal a predisposition on the part of governments to increase their powers at the expense of their citizens. Unfortunately, democractically elected governments appear to be no exception. If our cherished freedoms are to survive, therefore, it is imperative that we impose a strict onus on our governments. Only the doctrinaire would insist that additional police powers were never justified, but only the foolish would trust their governments to determine what and when. The wise democrat is always open to be persuaded, but he insists, nevertheless, on compelling evidence.

No less important is the issue of who shall decide. Who shall arbitrate the conflict between those who would alter and those who would maintain the existing mix of powers and freedoms? Who will determine how and where to strike the delicate balance involved? In liberal democracies like ours, the ultimate choice is made, not by our appointed police, but by our elected Parliament. Right or wrong, wise or unwise, our society believes that the people are the supreme authority and that authority is expressed in the acts of the people's representatives, Parliament. To a very great extent, therefore, those who would defy the acts of Parliament can be said to be interfering with the will of the people. Once Parliament has acted, its resolutions become law and the law is binding on all of us. This is what we mean by the rule of law. No one can be above the law and everyone must be subject to it - premier and pauper, constable and civilian alike. It has sometimes been said that the police represent the thin line between civilized society and destructive anarchy. Even if that were so, it should also be recognized that the rule of law represents a no less thin line between democracy and tyranny.

RCMP LAW-BREAKING AND THE PUBLIC INTEREST

The Central Issue

The supremacy of the rule of law is the principle which is at stake in the proceedings of this Commission. Since the end of October 1977, there has been a wave of allegations, revelations, and outright admissions that members of the Royal Canadian Mounted Police have been involved in a host of illegal activities. Despite the gravity and numbers of misdeeds involved (reportedly hundreds), as of this date not a single charge has been laid or disciplinary measure imposed.[1] Indeed, it has been the policy of the Canadian government to defer all law enforcement action on these cases pending the deliberations of this Commission.

As the Commission knows, the Canadian Civil Liberties Association has objected all along to this government policy and to the Commission's apparent acquiescence in it. In our view, this policy has encouraged a belief on the part of the public that the RCMP may be immune to or above the law. With every passing week, month, and year that these wrongdoers avoid the processes of justice, public cynicism about these matters can only be strengthened. The ultimate consequence could be the weakening of the threads which bind our society. The more that people believe the law is not binding on others, the greater the likelihood they will regard it as not binding on themselves.

With few exceptions, the testimony of the relevant cabinet ministers, chief officials and line officers of the RCMP has served essentially to reinforce these concerns. Much of their performance has been disturbingly unpersuasive. In numbers of situations, they invoked fallacious syllogisms to deny that certain conduct was unlawful; in other situations they invoked feeble rationalizations to excuse the conduct which they admitted was unlawful.

The Range of Offences, Defences, and Other Responses

By now, this Commission has heard subtantial evidence relating to surreptitious entries. Both on the security and the criminal sides, it appears that the RCMP has been involved in hundreds of surreptitious entries into people's property without judicial warrant or the occupant's permission. In many cases, the object was to plant bugs; in some cases, the purpose was to examine documents and premises. Numbers of government and RCMP witnesses have testified before this Commission that these "intelligence probes" did not violate the law. They could have given rise to civil trespass actions, but not criminal prosecutions.

As far as the post 1974 planting of bugs is concerned, an arguable case can be made for its legality. By then, the law had expressly provided for electronic bugging and it had reposed in certain persons (judges and the Solicitor General) the power to authorize it. To the extent that an officer were acting within the terms of such an authorization, it might be difficult to deny him the most effective means (surreptitious entry) to carry out the acts which had been authorized. As of the 1979 case of Regina v Dass,[2] however, the Manitoba Court of Appeal had ruled that this interpretation was wrong. An authorization to bug did not include a right to enter.

In any event, government and RCMP witnesses have attempted to apply this justification to the pre 1974 period as well. Jean Pierre Goyer, Solicitor General between 1970 and 1972, is quoted as having made the following statement about the permissibility of surreptitious entry during his term of office.

> "The prevailing school of thought at the time was that if the law authorized something, then the law authorized the procedures by which this was done".[3]

But, before, 1974, the law did not authorize electronic bugging. It simply failed to prohibit the practice. Thus, Mr. Goyer and his fellow witnesses would in effect be telling us that the pre 1974 law could be read as authorizing the procedures

for accomplishing whatever it did not prohibit. On the strength of such reasoning, the failure of the law to prohibit us from serenading our neighbours could be read as authority to enter their property in the event that their walls obstructed the sound of our voices.

The Appendix to this brief contains a short, incomplete list of possible offences which might be involved in these surreptitious entries. In our opinion, however, one need not know the details of such offences to realize that surreptitious entry presumptively constitutes an act of legal misconduct. If police officers could enter people's property with such impunity, why would the law almost always require judicial warrants in the absence of the occupant's permission? While there may well be reasonable arguments as to what statutory prohibitions apply, there can be no such reasonable arguments about the impugnable nature of the conduct, itself.

In the case of Operation Ham, there was even less legal justification. In that case, the RCMP Security Service surreptitiously entered premises which housed tapes containing the membership list of the Parti Quebecois. The tapes were physically removed from the premises so that they could be copied for further investigation. John Starnes, the then civilian director of the Security Service, testified that, since the documents were to be copied and not "stolen", there was no intention to commit an indictable offence. Moreover, he discounted the need for a warrant on the basis that the operation did not involve a search and seizure.[4] Mr. Starnes was terribly wrong on all of these counts. The removal of the membership list, without permission, deprives the lawful owner of their enjoyment, use, and possession during the time in question. If that does not constitue a "theft", the word has lost its meaning. Moreover, to the extent that the officers who entered the premises had to look for the tapes, they were involved in a "search". And, to the extent that they removed the tapes, there must have been a "seizure". To deny that such consequences were implicit in Operation Ham is to denude our language of its most common usage. Again, we are not talking about a situation which involves technical and sophisticated analysis. We are talking about the plain meaning of some of the most elementary words in our language.

Even in areas of more blatant and intrusive misconduct, RCMP officers insisted that they were legally justified. Corporal Peter Marwitz, for example, defended the "boxing in" of a target's car. He also said that it was acceptable to pick up a potential source and keep him overnight.[5] Staff Sergeant McCleery did not think that the barn burning was criminal because no one stood to gain and it prevented an even greater harm.[6]

In some cases, the RCMP witnesses frankly admitted the illegality of the activity at issue. Assistant Commissioner M.S. Sexsmith, for example, said that he did not need legal advice on the question of mail opening. He knew the practice was illegal.[7] Indeed, former Commissioner Higgitt testified that steps were taken to centralize the control of mail opening because the Force did not anticipate early legislation to legalize it.[8] Moreover, RCMP witnesses recited a litany of unlawful acts which were frequently committed by infiltrators and informers - demonstrating without a permit, putting up posters without permission, plotting revolutionary activities, and using false registrations at hotels.[9] Indeed, as far as these latter activities are concerned, a number of RCMP officials claimed that they had attempted without success to obtain guidance from the Prime Minister and the government.[10]

It is clear from the testimony that much of the law-breaking was a matter of official RCMP policy. In fact, the policy had developed to the point of anticipating how to protect those members who got caught and how to deal with those who refused to comply. In the latter case, former Commissioner Higgitt testified that while a non-cooperating member would not be disciplined for disobeying an order in violation of the law, he could be transferred. In his view, such a member was analagous to a person who cannot pilot an airplane because he cannot stand motion.[11] The willingness to commit illegal acts is seen, therefore, as an essential component of the officer's responsibilities.

By now, both the Commission and public record are replete with attempted justifications of RCMP law-breaking. Assistant Commissioner T.S. Venner, for example, considers it permissible for a police officer to break the law in a situation where there is an

overriding public interest and it would be impossible to do his duty within the law.[12] That statement arose in the context of a discussion about the pre 1974 planting of bugs. Despite the legal questions involved, Superintendent Donald Cobb maintained that the controversial tactics on source recruitment were within the spirit of the law and that must be the paramount concern.[13] Apparently, however, the barn burning and dynamite theft offended his standards of permissible illegality; he testified that he was "sick at heart" when those reports reached him.[14] His subordinate, Sergeant McCleery, appears to have a higher tolerance level. On the issue of the barn burning, McCleery said, "if it was a question of a barn versus a life, there was no question to me - it was the barn".[15]

At times, government witnesses even revealed outright contempt for the law. Note, for example, the following statement attributed to former Solicitor General Goyer.

> "If I had been told that they (RCMP) had to steal a key (to enter premises), I don't think it would have caused me any particular problem".[16]

In ethical terms at least, the government of the day must assume considerable responsibility for the RCMP's attitude to law-breaking. Even when these questionable practices became public, government spokesmen equivocated. At his press conference following the revelation of the break-in against the Parti Quebecois, for example, Prime Minister Trudeau himself was quoted as follows.

> "What I am saying is that I am not prepared to condemn, you know, irremediably, the people at the time who might have done an illegal act in order to save a city from being blown up..."[17]

Faced with practical examples of actual law-breaking, so many of the government and RCMP spokesmen have taken refuge in hypothetical justifications. The arguments appeal to our pragmatic natures. Who but the doctrinaire would not choose the destruction of a barn rather than a person? Who but a blind dogmatist would not prefer to have a law broken than a city blown up? Significantly, these spokesmen rarely include a description of precisely <u>how</u> the impugned misconduct averted precisely <u>what</u> overriding peril. Instead of specifics, there are generalities; instead of clarity, there is confusion.

At this point, it is appropriate to note that the current law in this country is not nearly as rigid or unresponsive to crisis as so many of these government and RCMP statements would imply. If there really had been reasonable grounds to believe that a building contained an atomic bomb set to explode, the police would not likely be obliged to run downtown first and get a warrant. In circumstances of such imminent peril, our law would seem to empower anyone, not just a police officer, to enter the premises and defuse the bomb. If the exculpatory provisions of the Criminal Code could not be effectively invoked, an accused person in such circumstances might well have recourse to the common law defence of necessity.[18] But what has prevented these defences from creating an open ended and dangerous police discretion is the law's requirement that there be a situation of urgent and imminent peril. It is simply not believable, however, that such considerations are even arguably applicable to the bulk of the law-breaking with which this Commission has been concerned.

Another frequent source of confusion concerns the law-breaking which is committed to protect the cover of an infiltrator or informer. This is the issue for which Messrs. Higgitt and Starnes attempted to obtain guidance from the government. While it is admittedly a difficult issue, it has been allowed to become inter-twined with all of the other incidents of law-breaking. The surreptitious entries, the theft of the PQ membership list, the barn burning, the mail opening, and the assaults committed on potential sources had nothing to do with protecting the cover of infiltrators and informers. Those acts were committed by police officers as police officers, not by anyone who was pretending to be anything else.

Proposals for Redress

Redress is long overdue. The survival of the democratic processes requires an overwhelming consensus that the law be obeyed. To whatever extent any constituency successfully avoids its obligation to obey, that consensus becomes weakened. It is imperative, therefore, that the RCMP law-breakers be brought to justice. As a general proposition, this Commission should recommend the prosecution and disciplining of every RCMP and government official who broke the law or counselled others to do so. This would include any cabinet ministers, deputy ministers, or civil servants to the extent that the evidence were to disclose their participation in or concealment of the illegalities at issue. The Commission's objective should be to remove as far as possible any notion on the part of the public that our society brooks a double standard between officialdom and citizenry.

Since the goal is equality with the civilian sector, there might be a case for leniency in some situations. Indeed, the Commission should recommend the exercise of normal prosecutorial discretion. Where relevant, those factors militating in favour of leniency or harshness in other cases should be applied to these matters. In short, the idea should be to duplicate as far as possible the treatment of delinquent police officers with that of their counterparts in civilian life.

Such an approach might assist in the disposition of at least one argument which has surfaced periodically during this controversy. We refer here to the recurring references to hypothetical emergencies and what might be justified to alleviate them. As indicated earlier, conduct otherwise unlawful might be excused to the extent that it is regarded as necessary to save life and limb in imminent peril.[19] If it can be shown that any of the impugned acts truly involved such emergencies, there might be a basis for the exercise of such prosecutorial leniency. Indeed, it would be useful for the Commission to articulate the applicable principles in this area and propose them as a statutory codification for the common law defence of necessity.

Apart from such considerations, there would be little basis for excusing these law-breakers. In our view, there should be prosecutions of those who broke the law in compliance with policy as well as those who did it on their own initiative. Subordinates should be prosecuted along with superiors. In the post-Nuremberg period, the Commission should attach little weight to the defence of superior orders.

A top government official in one of the provinces has recommended against prosecutions for the RCMP misconduct there. Richard H. Vogel, the Deputy Attorney General of British Columbia, wrote a report for his superior on the subject of surreptitious entry by the criminal investigation branch of the RCMP in that Province.[20] Apart from the fact that his list of possible charges is unwarrantedly narrow, Mr. Vogel based his recommendations against prosecution on rather questionable policy considerations. He says, for example, that since the practice of surreptitious entry appears to have been documented in a number of court cases without adverse judicial comment, this led to a reasonable assumption on the part of the relevant police officers that such conduct was not prohibited by law. Mr. Vogel's conclusion is hardly justified. Unlike the situation in the United States, any evidence which the police obtained from unlawful entry would nevertheless be admissible against the suspects they were prosecuting. Thus, our courts simply would not have had the occasion to rule on the propriety of the entries. Indeed, the argument has so often been made in this country that the proper response to police law-breaking is not the suppression of the evidence so acquired but the prosecution and disciplining of the impugned police officers. To conclude, therefore, that judicial silence or inaction implies acceptance is to commit an unwarranted non-sequitur.

Another consideration which Mr. Vogel invokes is his assertion that in the past the Department of Justice in Ottawa and some provincial officials had given an opinion that it was not unlawful to enter premises so long as there was no intention to commit an indictable offence there. But the evidence of such legal opinions is not nearly as clear as Mr. Vogel suggests. Indeed, elsewhere he seems to acknowledge this when he says "it can fairly be said that none of those concerned at that time

squarely addressed the issue of the propriety of the police practices". In any event, as indicated above, it is simply not credible to attribute to any reasonable person the belief that there was nothing wrong with so many of the surreptitious entries.

Another argument against prosecution, in the opinion of the B.C. Deputy Attorney General, is the absolute discharge granted to the police officers who planned and authorized the raid against L'Agence de Presse Libre de Quebec. If the end result of the process is such leniency, there would presumably be no point in subjecting people to the unpleasantness of prosecution. Mr. Vogel's reasoning overlooks the fact that so much of the APLQ case was heard in camera; we simply do not know, therefore, how closely the facts of that case resemble the situations in British Columbia. One difference that we do know about is that, while the Quebec case dealt with a presumed threat to national security, the B.C. situations arose in the context of ordinary criminal law enforcement. Moreover, the APLQ sentence was never considered by a higher court. This makes it difficult to cite as an authority in other provinces. Indeed the failure to appeal might well have created in the public mind a suspicion of complicity between the crown and the defence. Mr. Vogel's opinion suffers from its total neglect of this problem.

Finally, the British Columbia opinion relies also on the belief that the motives behind the surreptitious entries "involved normal policing duties". But how often have political dissidents in Canada been warned that their lofty motives cannot excuse their violations of the law? Note, for example, the speed and vigor of the recent prosecution against postal union president Jean Claude Parrot. His allegedly altruistic desire to improve the lot of the postal workers did not excuse him from prosecution or even imprisonment. How, then, can a government in this country invoke benign motives to excuse police officers from having to answer in court for their misdeeds?

Perhaps it may be argued that this proposed policy of prosecution will create a risk of demoralizing certain sectors of the RCMP. In the increasingly dangerous world which we anticipate, we are naturally concerned about a possible weakening

of our security forces. But the failure to take these measures may create even greater risks. The viability of our whole way of life depends to a great extent upon the voluntary lawfulness of our various infra-structures. If it were otherwise, there would be an ongoing need for repressive police measures. The failure fully to prosecute the RCMP wrongdoers threatens to unravel these voluntary infra-structures.

During the fall of 1978, for example, Canadian Labour Congress President Dennis McDermott and his fellow executives declined to support the Canadian Union of Postal Workers when that union defied a Parliamentary order to terminate its strike. Had the CLC endorsed or joined in the illegal strike of CUPW, this country could have faced a dangerous situation - perhaps even bloodshed. To the extent that RCMP wrongdoers are excused for their misdeeds, our society will threaten the political standing of the Dennis McDermotts with their own constituencies. Who will be in charge and what will happen the next time there is a movement to defy Parliament? Double standards inevitably undercut the responsible leaders everywhere in our society. The beneficiaries will be the authoritarians who will claim, with some justification, that bourgeois democracy is a hypocritical sham. Thus, we urge this seemingly harsh policy, not because we are sanguine about its impact on the Force, but because we are even more alarmed about what the alternatives might inflict on the rest of our community.

Moreover, such a strong response may be necessary to ensure public confidence in whatever reforms are recommended by this Commission. So long as these wrongdoers avoid the processes of justice, why should anyone trust that amended laws would be enforced more conscientiously than the existing ones?

As a companion measure to the foregoing, the Canadian Civil Liberties Association asks the Commission to recommend a policy of compensating the victims of RCMP misconduct. It would be inappropiate to cause the victims any additional expense or hardship. Subject perhaps to those situations where the identification of a victim could cause serious security problems, financial payments should be made

on an ex gratia basis by the Federal Government at least to those who sustained financial losses and/or legal expenses in respect of this Commission's proceedings. The payments should be made sufficiently generous and forthcoming to restore public confidence in our legal and governmental institutions.

THE GENERAL SUSCEPTIBILITY TO SURVEILLANCE

The Values at Risk

Since the inception of what might be called the RCMP controversy, the key law reform issue has concerned what new powers might be granted to the police and security forces. In our opinion, much of the public discussion on this issue has proceeded from an invalid perspective. We believe that in many respects the police and security forces already have more powers than are necessary for the adequate protection of society. In consequence, there ought to be more public attention focused, not on the adoption of new powers, but on the adoption of new restrictions with respect to existing powers.

While many techniques of police surveillance such as mail opening and electronic bugging are either prohibited or controlled, surveillance *per se* is completely permissible. In general, nothing prevents the police from watching us, gathering data about us, and recording such data in special dossiers which identify us. The data gathering process can lawfully include conducting pretext interviews, constantly checking our whereabouts, and even deploying spies to infiltrate our organizations and insinuate themselves into our confidence. In the opinion of the Canadian Civil Liberties Association, the current law permits too much and prevents too little police surveillance of civilian affairs.

In our view, surveillance itself represents an intrusion into some of the most vital values which are cherished by democratic societies. In the first place, the most obvious value at issue is personal privacy. To the extent that others acquire knowledge about us which we would prefer them not to have, our sphere of personal privacy is reduced. So often we hear the admonition that if you have nothing to hide, why fear any intrusion on your privacy? If no adverse use is made of the information, what injury do we suffer simply by having facts about us pass out of our control? To pose such questions is to treat people as though they were nothing more than what former Chief Justice McRuer called, "micro-organisms of the state".[1] Personal privacy is a component of human dignity. The question is not what have we got to hide but what is the justification for the intrusion upon us.

In the second place, security surveillance is a threat to political liberty. One of the paramount rights in democratic societies is the right to dissent - to speak, write, publish, assemble, associate, and organize freely and openly in opposition to incumbent governments and their policies. To the extent that police surveillance has a political component, it could intimidate the exercise of these liberties. For many people, the knowledge or suspicion that the police are watching may be sufficient to deter them from participation in political dissent. Alternatively, such knowledge or suspicion could influence the way people exercise their political liberties. If they think their telephone conversations are being monitored, they will not speak freely on the telephone. If they think their meetings are being spied upon, they will not speak freely at their meetings. In short, the prospect of police surveillance can have a chilling effect on the character and integrity of democratic dissent.

But why, it might be asked, should the police and government be regulated with respect to any forms of surveillance which are not unlawful for civilians to employ? Is a Tory spy in a Liberal election campaign, for example, less of an encroachment than a police spy? Of course, the attempt to regulate the police and government in this area does not imply any acceptance of similar practices in the private sector. Indeed, there have been a number of recent efforts to provide greater protections in this aspect of the inter-civilian relationship, for example, the confidentiality of health information, the activities of credit agencies, the proposed regulations for computer data storage, etc. In any event, it is not unprecedented to demand a higher level of performance from the public sector than might be tolerated in the private sector. Moreover, the accumulation of resources and power in our police and government agencies make such surveillance by them especially intimidating to privacy and dissent.

The Selection of Surveillance Targets

It is crucial, therefore, that the selection of RCMP surveillance targets be governed according to the most exacting criteria and scrupulous procedures. Recent Canadian practice appears to fall far short of these prerequisites. According to some sources at least, many of the targets of RCMP surveillance have apparently included individuals and groups of democratic orientation. Among such targets are the following: Grace Hartman of CUPE, Roy Atkinson of the National Farmer's Union, Ed Broadbent of the New Democratic Party, Toronto lawyer Clayton Ruby, the Canadian Association of University Teachers, the Parti Quebecois, the National Indian Brotherhood, and the former Waffle faction of the New Democratic Party. Admittedly, in a number of these cases there are only allegations. But the allegations did appear in the public media and, in the context of other revelations of RCMP wrongdoing, they must inevitably raise disquieting concerns among the dissenting constituencies and general public.

Such concerns are bolstered by certain corroborative factors. It is now a matter of undisputed public record, for example, that the democratic Parti Quebecois had its membership lists stolen by the RCMP. No less an official than former Solicitor General Warren Allmand admitted the surveillance of farm leader Roy Atkinson.[2] He also referred to some RCMP infiltration at meetings of the National Black Coalition[3] and a tendency on the part of some members of the security service "to look upon any sort of opponent to the (Chilean) junta and supporter of Allende as being a subversive".[4] As a further indication of the poor judgment exercised by security officers, Mr. Allmand referred to a situation where an RCMP report had labelled a minister's aide as a homosexual and communist. The former designation was based upon the fact that one of the people with whom he had lived at some time earlier was a known homosexual; the latter designation was based upon the fact that as a student in the 1950's the person had belonged to some sort of a left-wing organization.[5] According to Allmand's testimony, the RCMP definition of subversion included "being militant against the status quo...if it was on the left rather than on the right".[6] Indeed, the former Solicitor General was sufficiently disconcerted about the surveillance practices of the RCMP that he turned over to the Commission a list of targets that he considered inappropriate.[7]

A recent incident involving a client of Toronto lawyer Paul Copeland, reinforces these misgivings about the judgments of the security service. Two members of the security service attended at Mr. Copeland's office in order to interview one of his clients who is of Vietnamese extraction. A few days earlier, the client had participated in a demonstration in Ottawa protesting the Chinese invasion of Vietnam. According to one of the officers, the interview was undertaken for the following reasons.

> "We are not worried about that (involvement in the demonstration). The only thing is that if there is any possible conflict between the...left and the right, that's where we come into play...when it comes to the business of conflict, that's where we have to say whoa. We can't let that happen. People are going to be hurt; property is going to be damaged... Our job is to prevent violence as you appreciate... Local police departments are not in a position to undertake that type of investigation. It is our responsibility and we have been charged from Ottawa to undertake this kind of investigation. This is not a local directive; this is a national directive down to us."[8]

While the desire to prevent violence may be laudable, we must nevertheless be concerned about the chilling consequences of such an interview on the lawful protest activities of these Vietnamese immigrants. We must also question what the anticipated violence might have to do with the national security of Canada. It is difficult to believe that, regardless of its unpleasant consequences, the anticipated violence within the Vietnamese community could result in the illegal overthrow or impaired functioning of the Canadian government.

To some extent at least, the propensity to excessive surveillance can be attributed to the apparently broad and vague mandate which the Government of Canada promulgated for the security service on March 27, 1975.[9] Among other things, it authorizes surveillance over "activities directed toward accomplishing governmental change within Canada or elsewhere by force or violence or any criminal means".and even "the encouragement...of any criminal means...for the purpose of accomplishing" such change. The range of permissible surveillance appears to exceed any genuine security threats. Consider, for example, the one day national walk-out conducted by the Canadian Labour Congress against the federal government's anti-inflation controls. In some provinces at least, the walk-out was considered a violation of

the "no strike" provisions of the labour relations laws.[10] A plan by a group to violate a provincial statute might well satisfy the Criminal Code definition of conspiracy "to effect an unlawful purpose".[11] On the basis of such "criminal means", the reputable unions of this country might have been permissible targets for this RCMP surveillance. Although the upshot of the walk-out might have been a change in government policy, it is difficult to view the matter as a threat to national security.

On this basis, to what extent could some of the anti war and anti nuclear protests have attracted such surveillance because their sit-in tactics may have involved such planned violations of provincial petty trespass laws? While there might not be an objection to enforcing the law against such constituencies even in respect of their minor misconduct, there is a very strong objection to making them permissible targets for the security surveillance of the RCMP. When the mandate is read together with the Official Secrets Act,[12] the Canadian Labour Congress and the Quakers could have been targets for electronic bugging, infiltration, and systematic disruption. To what extent, moreover, could it be argued that public praise of Martin Luther King's civil disobedience amounts to "encouragement of...criminal means" within the meaning of the mandate? How far, then, are his Canadian sympathizers vulnerable to this RCMP surveillance?

Even where the "activities directed toward" governmental change involve force or violence, the mandate may be needlessly wide. It fails to specify when the force or violence must be planned or likely to be committed. Might that mean, for example, that a group seeking ultimate world revolution could be subjected to surveillance now, even though its current activities were confined to harmless pamphlets and impotent oratory? As a matter of strategy, such a group might now deliberately avoid revolutionary action and even rhetoric in order to win adherents so that one day it will be strong enough to resort successfully to force or violence. Could it be said, therefore, that the pamphleteering and oratory constitute "activities directed toward"the use of force or violence? To what extent, then, could the 1975 mandate permit intrusive surveillance of completely lawful activities, despite the fact that the threat to national security may amount to little more than a figment of a wild imagination?

Even in the foreign arena, the mandate appears to suffer from needless overbreadth. The RCMP is mandated, for example, to investigate and counter "foreign intelligence activities directed toward gathering intelligence information relating to Canada". Unlike some of the other sections of the mandate, this provision does not require that the activities at issue must in any way be hostile to or directed against Canada. What would be the case, for example, with the efforts of the Egyptian or Israeli governments and their Canadian sympathizers to determine the likely votes of Canadian politicians on the proposed relocation of our embassy to Jerusalem? By itself, the attempt to obtain such intelligence does not violate Canadian law or necessarily damage Canadian interests. Could the 1975 mandate nevertheless subject those involved to RCMP investigation and counteraction?

It is difficult to square the mandate with the democratic philosophy. Generally, democratic societies have believed that their citizens should be immune from police intrusion unless they were violating the law. Under the Criminal Code, for example, there cannot be any entries, searches, seizures, or arrests without reasonable grounds to suspect criminal offences. But where presumed or remote threats to national security are imagined, so much of the RCMP surveillance capacity remains unfettered by such restrictions. There must be cause for concern, therefore, that the RCMP mandate could create serious problems for the civil liberties of Canadians.

Implicit in the five year existence of this mandate, is the belief that the countervailing threats to our national security would be even greater if the RCMP were not granted the kind of leverage involved. The idea is to prevent the apprehended harms before we suffer them. The policy appears to be based upon the old adage that an "ounce of prevention is worth a pound of cure".

Some Relevant Experiences From Elsewhere

On the basis of one of the few independent and empirical investigations into such matters, there is substantial reason to doubt whether the preventive benefits of such broad mandates outweigh the civil liberties costs. On a number of recent occasions, the General Accounting office of the U.S. Congress has audited the performance of the FBI at least in the domestic security area. In an era when FBI surveillance was relatively unencumbered by restrictions, the following GAO finding is instructive.

> -Of the 17,528 domestic intelligence investigations of individuals undertaken by the FBI in 1974, G.A.O. estimates in only about 2% did the FBI obtain advance knowledge of the targets' activities- legal or illegal.[13]

This and several similar findings have prompted the GAO to reach the conclusion that "generally the FBI did not report advance knowledge of planned violence".[14] In confirmation of this conclusion, the late U.S. Senator Philip A. Hart, a member of the Senate Church Committee, noted, "the FBI only provided the Committee with a handful of substantiated cases - out of the thousands of Americans investigated - in which preventive intelligence produced warning of terrorist activity".[15] Moreover, Joseph Califano, a former White House official in the Johnson administration, declared that "advance intelligence about dissident groups (was not)...of much help" in helping responsible officials cope with the urban unrest of the 1960's. Despite the fact that he had major duties in this area, Mr. Califano insisted that what was needed for this purpose was physical intelligence about the geography of major cities; the attempt to "predict violence" was not a "successful undertaking".[16]

It is even questionable whether normal law enforcement benefited significantly from the wide open surveillance activities of the FBI. Between 1960 and 1974, the FBI conducted more than 500,000 investigations of persons and groups for "subversive" activity, i.e. on the basis that they might be likely to overthrow the government of the United States. Yet in all that time, not a single individual or group was prosecuted under the laws which prohibit planning or advocating action to overthrow the government.[17] Indeed, as late as 1974, no more than an estimated 1.3% of that year's investigations yielded successful prosecutions for anything.[18]

Despite the fact that the American experience casts such doubt on the benefits of preventive intelligence, there has been some reluctance in that country to abandon it completely. No doubt, some Americans, like the GAO, feel incapable "of adequately assessing the value....of an operation which by its very nature is preventive and by its mere existence may be accomplishing its purpose".[19] Thus, under the recently promulgated Attorney General guidelines[20] and the recently published recommendations of the Senate Church Committee,[21] the FBI would appear to be left with some preventive intelligence authority. The direction, however, is the other way. During the past number of years, the Americans have made a substantial effort to tie the FBI much more closely than ever to a criminal standard for its investigations.[22]

In early 1976, U.S. Attorney General Edward Levi laid down a number of guidelines which were designed to restrict the scope of the FBI's domestic security program.[23] The most important aspect of these guidelines, according to one staff member of the Senate Church Committee, was the abandonment of sedition as a basis for investigation.[24] While the concept of sedition had allowed the FBI to probe the political activities of anyone who proclaimed a revolutionary ideology, the Levi guidelines stressed, instead, "the need for specific and articulable facts indicating that someone is engaged in activities that involve or will involve serious violence".[25] Although there are key sectors of American public opinion which continue to believe that even these guidelines could permit too much, it appears nevertheless that significant change has occurred.

Following the adoption of the Levi guidelines, the FBI transferred its domestic security investigations from the intelligence division to the general investigative division in order that these matters be "tied as closely as possible to actual or potential violations of federal law".[26] In August of 1976, the FBI promulgated internally an investigative policy which was even more restrictive than the guidelines.[27]

The findings of the General Accounting Office confirmed the impact of the new policy. On June 30, 1975, the FBI was involved in 9,814 domestic intelligence matters. By the end of June 1977, the number had shrunk to 642.[28] As of June 30, 1975, 1,454

domestic intelligence cases had been initiated. As of the same date in 1977, the number of cases initiated was down to 95.[29] During the same period, the number of FBI agents used for domestic intelligence investigations had been reduced from 788 to 143 and the number of informants had dwindled from 1,100 to 100.[30] Although the amount of revolutionary activity and urban unrest has considerably subsided since the turbulent '60's, that could hardly explain such a substantial decline in FBI investigative activity within so short a period in the 1970's. Indeed, the GAO specifically found that a major factor in the decline was "the interpretation given to the Attorney General's domestic security guidelines".[31] As further corroboration of the trend, the GAO was unable to find any violations of the guidelines or any indication that broader intelligence gathering might be continuing under the guise of other investigations. On the contrary, even though the guidelines might permit some preventive intelligence gathering, the GAO found that as a matter of practice full investigations were approved only when the apprehended force or violence was slated to occur "within the foreseeable future".[32]

The thrust of this new policy appears to have survived the Republican administration which conceived it. Mr. Levi's Democratic successor in the Carter administration adopted a similar approach. Testifying before the Senate Judiciary Committee, Attorney General Judge Griffin Bell opposed FBI investigations of "protest groups who speak of violence in the abstract but do not engage in it". In Judge Bell's view, FBI domestic security investigations should require "information that a group is preparing to commit a violation of law or is engaging in a continuing pattern of federal law violations".[33] Significantly, as late as 1978, the FBI hierarchy itself declared that it had "no problems with the guidelines".[34]

While the Americans have probably been most forthright, there are indications that other common law countries are also moving away from a reliance on such shadowy notions as sedition and subversion. The Hope Commission in Australia recommended that certain surveillance activities in that country should not be exercisable in relation to domestic subversion unless the warrant granting authority is satisfied that the targets are <u>already engaged</u> in the apprehended activity.[35] The Powles Commission in New Zealand recommended that the government in that country accord "higher priorities to espionage and terrorism, and lower to subversion".[36]

Other Relevant Considerations

Where foreign espionage and intelligence are concerned, there is an arguable case for more investigative scope. The activities of foreign nations are not generally as vulnerable as domestic groups to the immobilizing power of normal law enforcment processes. Indeed, it would often be tactically foolish to prosecute foreign agents and spies. Prosecution could risk the premature uncovering and disclosure of our counter-intelligence program. Our informers, undercover agents, and counter-spies could be imperilled. Moreover, no matter how many foreign spies we might arrest and incarcerate, we would be unlikely to paralyze their sponsoring country's ability to continue its espionage activity. Faced as we are in the arena of international relations with powerful and resourceful adversaries, there is an argument that we cannot rely on the normal processes of law enforcement to protect our security interests. Again, this does not mean a carte blanche for our security service. But it does mean that the susceptibility to surveillance may have to be less narrow than that which obtains in the domestic arena.

Moreover, the investigative standards need not be as tight for foreign nationals as they are for Canadian nationals - citizens and permanent resident aliens. The most democratic of societies cannot incur the same obligations with respect to those who are visiting temporarily as to those who are staying indefinitely. But, while the standards may differ, there must still be standards. The canons of procedural fairness must embrace everyone who sets foot on our shores. Ensuing sections of this brief will attempt to establish minimum standards for everyone together with tighter standards for citizens and permanent residents.

The susceptibility to surveillance will also differ according to the purpose for which it is exercised. A potential informer, for example, may have to be subjected to some form of investigation in order to establish his credibility. But it would be quite inappropriate for him to be susceptible to the amount and duration of surveillance that might be employed in the case of a person himself suspected of misconduct. Different standards might also be applied in the case of security checks for those applying to hold classified government jobs. In such cases, however, the affected persons might be asked to consent to the investigation.

The proposed technique of surveillance will also be relevant. The more intrusive the technique, the higher the permissible threshold must be. Thus, for example, the electronic bugging of a person's house will require a tighter standard than a perusal of his bank records. At this point, it should also be noted that while the criminal standard frequently provides a useful basis from which to begin an analysis of these matters, it is nevertheless inadequate. Some forms of surveillance are so intrusive that they should not be permitted unless some especially dangerous category of crime is involved.

To concede the propriety of certain surveillance techniques on some occasions, however, is not to confer a carte blance on the RCMP even then. So far as possible, the RCMP's acquisition, retention, and dissemination of personally identifiable information should be limited to what is relevant to the security or law enforcement purposes which occasioned the exercise. In short, while some intrusions on personal privacy may be necessary, they should not exceed what is necessary. Moreover, to whatever extent restrictions are imposed upon the surveillance activities of the RCMP, the law should ensure that no other agencies of the federal government can step into the breach.

No introductory remarks concerning the susceptibility to surveillance would be complete without some reference to the files and dossiers which the RCMP reportedly keeps on a wide variety of political and pressure groups or organizations that do not remotely imperil national security. Not all aspects of this practice are necessarily objectionable. Certainly, the more research material available to the security service, the better the chances they will make intelligent judgments. What we do urge, however, is that the information so acquired be based entirely on publicly accessible sources. And the dossiers so compiled should also be rendered publicly accessible. In other words, what may now be surreptitious surveillance should become a matter of public knowledge. The RCMP should be encouraged to know and understand the political and pressure group processes in our society. They should be exposed to a wide variety of information and viewpoints concerning the Canadian Labour Congress, the National Indian Brotherhood, the National Farmers Union, and even the Canadian Civil Liberties Association. But, in the absence of some demonstrated security problem, the intelligence gathered in relation to such groups should be open and public.

Hereafter, we shall explore the kind of guidelines that might apply where there are arguable security threats. How surreptitious and instrusive may the intelligence collection methods be? What access might there be to the resulting files? Who are appropriate targets for such activity? What uses may be made of the information?

SOME SPECIFIC TECHNIQUES OF SURVEILLANCE

Electronic Bugging

The Commission has heard a great deal of testimony about the electronic bugging practices of the RCMP. Both in security and criminal matters, there has been considerable resort to electronic surveillance. Indeed, many of the impugned surreptitious entries were committed in the interests of planting audio surveillance devices.

Despite its popularity with sectors of the RCMP, electronic surveillance is one of the most intrusive investigative techniques in the police arsenal. Unlike the search of premises, the electronic bug cannot discriminate. It overhears everyone within earshot - the guilty, the suspected, and the innocent alike. By now, for example, some 1500 people have been convicted of criminal offences arising out of American police bugging in 1969 and 1970.[1] During the course of this surveillance, however, the American authorities overheard more than 40,000 people in more than a half a million conversations.[2] Indisputably, the overwhelming number of these people were innocent of wrongdoing. And, apart from gambling, the overwhelming number of intercepted conversations were non-incriminating - more than 75% in narcotics wire-taps and 84% in theft related matters.[3] Unfortunately, however, the technology is not sensitive to these distinctions. Virtually everyone and everything is swept up in the electronic net.

The foregoing figures refer to law enforcement bugging. In the area of security and intelligence, the dragnet character of the technique is even more pronounced.

A few comparative figures will illustrate the wider sweep of intelligence bugging. According to a recent report, U.S. federal law enforcement taps endured an average of 13.5 days and overheard an average of 56 people and 900 conversations. By comparison, the average national security tap lasted from 78.3 to 290.7 days. On this basis, the number of people heard would have reached somewhere between 5500 and 15,000 per bug.[4] While the Canadian statistics do not include the number of people and conversations overheard, they do reveal the length of the bugging operations. Here too a similar pattern emerges. In 1978, the average duration of a law enforcement bug was 73.5 days.[5] In the case of the federal security bugs, it lasted as long as 244.71 days.[6]

In view of this enormous capacity to intrude, to what extent is the game worth the candle? Are the protective benefits derived worth the privacy costs incurred? Apart from security matters, organized crime is the evil which is most often invoked to justify the wiretap powers of the police. The argument is frequently made that the criminal syndicates are so well protected by subordinates, intermediaries, and customers that it is virtually impossible to secure evidence against them. According to a number of police intelligence authorities, only electronic surveillance has the capacity to penetrate the protective walls surrounding these underworld operations. RCMP witnesses before this Commission have testified that, since the enactment of the 1974 statute, electronic bugs have helped them to nail some 256 participants in organized crime.[7]

At the same time, however, RCMP spokesmen have admitted that they have performed no comparative studies.[8] The American material is more illuminating. After almost 10 years of wiretap legislation, a GAO study published the following headline "War on Organized Crime Faltering - Federal Strike Forces Not Getting the Job Done".[9] Moreover, while the U.S. authorities could never boast really decisive victories against organized crime, they often appear to have had as much success without the bugs as with them. In the mid 1960's, for example, the FBI was ordered to stop its growing practice of electronic bugging in the domestic arena. Yet, from 1966 until 1969 without any bugging at all, there was a reported increase in convictions and a tripling of indictments against members of the syndicates.[10] Despite its unhappiness about this lack of wiretap authority, the FBI declared that 1968 "was a year of striking accomplishment against the bulwark of the hoodlum criminal conspiracy - La Cosa Nostra".[11] Law enforcement claimed this success without the use of electronic surveillance.

It is significant also that the U.S. President's Commission on Law Enforcement and the Administration of Justice paid special tribute to two cities for continuing "to develop major cases against members of the criminal cartels".[12] The two cities mentioned were New York, where the police were bugging extensively, and Chicago which was subject to Illinois' total ban on such activities.[13]

Despite the grant of special wiretap powers by the 1968 statute of the American Congress, there has been a mixed response from the special strike forces which had earlier been created to fight organized crime. One strike force coordinator made the following statement about electronic surveillance.

> "It has not often been applicable. We have been able to make a case without it and we have had more indictments and convictions than any strike force in the country".[14]

Robert Blakey, an eminent American supporter of police bugging, has pointed out that in the little under a decade after U.S. federal law validated this practice, approximately 55 Cosa Nostra members were being convicted per year.[15] But, Blakey admits, only 10% of these cases involved electronic surveillance.[16]

Thus, in the American battle against organized crime, the most that can be said for electronic bugs is that sometimes they may have been helpful. This is hardly an impressive record for a technology which simultaneously invades the privacy of countless innocent people. In view of the encroachments involved, the justification for the power to bug should be based, not on its utility in some situations, but on its necessity for the overall protection of society's most vital interests. While we don't have such helpful records of the Canadian experience, there is no reason to believe that this weapon is more necessary in Canada than it has proved to be in the United States.

In security matters, the impact of bugging is much more difficult to measure. Since the prosecution and incarceration of offenders is not often the object of the exercise, there are few tangible bench marks by which to judge these eavesdropping techniques. There are , however, some barometers which are highly suggestive. And what they suggest is that even in security matters, electronic bugging is hardly the indispensable technique which some of its proponents have claimed.

Throughout the years, people who have worked in the security field have made a number of significant statements about their experience with electronic devices. Morton Halperin, a former member of the U.S. National Security Council, expressed his views this way.

> "In my judgment, such surveillance has extremely limited value and can in no sense be called vital to the security of the United States...the American government has many other sources of information of significantly greater value".[17]

Former U.S. Attorney General Ramsay Clark contended that if all security taps were turned off, the impact on security would be"absolutely zero".[18]

In the event that the involvement of these two commentators with the American Civil Liberties Union might generate some scepticism about their judgments, we should note the similar assessments which have emanated from people who are miles away from them on the ideological spectrum. Consider, for example, former FBI Director, the late J. Edgar Hoover.

> "I don't see what all the excitement is about. I would have no hesitancy in discontinuing all techniques - technical coverage (i.e. wiretapping) microphones, trash covers, mail covers, etc. While it might handicap us I doubt they are as valuable as some people believe and none warrant FBI being used to justify them".[19]

Mr. Hoover's associate who was in charge of these matters for him, the late William Sullivan, recommended a few years ago that all security bugs and taps be turned off for a period of three years in order properly to assess their importance.[20] It is fair to infer that a knowledgable official would not be likely to make such a proposal if he thought that the results would create a serious danger to American security.

In this connection, there is on the public record a most remarkable statement made by the man whose activities in these matters drove him to resign in disgrace from the most powerful office in the world - former U.S. President Richard Nixon.

> "They (the taps) never helped us. Just gobs and gobs of material: gossip and bull shitting... The tapping was a very unproductive thing. I've always known that. At least it's never been useful in any operation I've ever conducted".[21]

In a random sample of domestic intelligence cases, the Church Committee of the U.S. Senate found that while 83% involved informants, only 5% involved electronic surveillance.[22] Moreover, since 1972 the Americans have not used electronic bugs for domestic intelligence purposes.[23] In the domestic arena, their bugging has been done entirely under the authority of the 1968 statute which requires probable cause that

certain criminal offences are involved.[24] Even more significant, is the relative lack of effort on the part of the administration or the Congress to broaden the domestic wiretap authority in that country.

Faced with that kind of practice in the most central and targeted country in the world, it becomes extremely difficult to justify the substantially broader bugging power in this country. No doubt, it will be argued that our potential domestic security problems are proportionately greater than those in the United States. Even if that were so, it could not account for the different attitude in the United States. On the basis of their more comprehensive auditing of the intelligence experience, many Americans have concluded that the benefits of domestic security bugging are too marginal to justify the costs. It is not that the Americans minimize the potential domestic dangers they might face. Rather, their view is based upon their scepticism about how much additional protection such bugging would provide. There is no reason to believe that such surveillance is any more necessary or productive in Canada. The cost-benefit ratio in the United States depends more upon the nature of the exercise than upon anything uniquely or distinctively American. In this connection, it is not without significance that RCMP Superintendent Donald Cobb testified as to how domestic security targets in this country were developing techniques to avoid the impact of electronic surveillance. While he maintained that the bugs do provide useful information, he acknowledged that they produced "much less than before".[25]

On the basis of all these considerations, the Canadian Civil Liberties Association believes that the bugging authority provided in the Official Secrets Act[26] should be completely repealed insofar as domestic intelligence gathering is concerned. There is no reason to believe that such broad powers of intrusion are likely to contribute anything more to the protection of the Canadian public than their counterparts had contributed to American security. And, there is no reason to believe that bugging in this country is significantly less threatening to personal privacy and political liberty than it has been in the United States. It is difficult to conceive of a security related offence in the domestic area that is not already provided for in the Criminal Code. Indeed, some of them could relate also to foreign matters, for example, high treason, intimidating Parliament, sabotage, hi-

jacking, bribery, extortion, etc. As we have frequently argued in other forums, even the bugging power available in the Criminal Code substantially exceeds what has been demonstrated as necessary. But, at least those powers require some reasonable indication of certain criminal conduct. There has simply been no case made out for a domestic bugging power beyond the considerable range contained in the Criminal Code.

In view of the sizeable dangers, jungle character, and relative invulnerability of foreign powers to domestic law enforcement, there might be an argument for an additional limited form of electronic bugging in order to deal with foreign threats. Even in this area, however, it is hard to justify the broad bugging powers permitted by the Official Secrets Act. In a number of situations, bugging warrants can be obtained for the surveillance of "activities directed toward" certain dangerous objectives, without any indication as to how imminent the realization of those objectives must be. Indeed, might such realization be so far off in the future as not to constitute any credible danger at all? Moreover, the Official Secrets Act authorizes this pervasive eavesdropping even though there may be no necessary indication of any unlawful conduct. By contrast, a recently enacted American statute employs a criminal standard for all bugging, even in the foreign arena, against American citizens and resident aliens.[27]

In the opinion of the Canadian Civil Liberties Association, if conduct is not considered sufficiently dangerous to warrant a legal prohibition, there is a real question whether it should suffice to trigger such intrusive surveillance against citizens and permanent residents. On the basis of all these considerations, it is our view that only in respect of espionage on behalf of foreign powers does the Official Secrets Act make an arguable case for an additional bugging power against Canadian citizens and permanent residents.

Alternatively, even if this country were to retain a power to bug such categories of people in situations beyond the criminal standard, the specifics of the applicable enactments would still require amendment. Section 16(3)(c) of the Official Secrets Act, for example, talks about "activities directed toward accomplishing governmental

change....by force or violence or any criminal means". But why should the law allow something as pervasive as electronic bugging for activities that may employ "any criminal means" beyond "force or violence"? As noted earlier, this section might create a risk of such surveillance against the organizers of the Canadian Labour Congress national walk-out on federal wage and price controls.

Moreover, as indicated above, the powers contemplated by this section are not addressed to the timing of the force or violence. Our fear is that the wording may be broad enough to create a risk of electronic surveillance in situations where force or violence is a remote fantasy rather than a current reality. To whatever extent the criminal standard is abandoned in this area, there should be, at the very least, a requirement that the apprehended force or violence be likely to occur within the near future. And, not any such violence should suffice, it should have to be serious.

As far as foreign visitors are concerned, there might be an argument for a bugging power which is not as tied to a criminal standard. We have already acknowledged that this country's obligations to temporary visitors need not be on quite the same level as those which it owes to its permanent residents. Moreover, the experience would indicate that a significantly higher proportion of visitors are involved in foreign intelligence activity.[28] Perhaps the brevity of their stay in this country might make it difficult to accumulate sufficient evidence to meet the criminal standard?

But even though a criminal standard may be unduly tight for foreign visitors, the Official Secrets Act may be needlessly broad. At the very least, in our view, the bugging of foreign visitors should require a discernible element of hostile foreign intelligence activity.

Another key defect in the Canadian law is the power exercised by the Solicitor General to authorize such surveillance in the security area. Why should court approval be necessary for ordinary criminal cases but not in security matters? Even if the Solicitors General of this country were to perform such duties with

impeccable judgment, there is too great a risk that they would not be perceived that way. As politicians, they will frequently be suspected of having acted on the basis of political rather than security considerations.

Indeed, one of the greatest concerns about surveillance in security matters is the risk of confusing legitimate dissenters with subversive conspirators. So long as the effective decisions on such matters can be made by the government of the day, this will lead to anxiety among its political competitors. Indeed, the mere existence of this power could in time inhibit and intimidate various manifestations of legitimate social and political protest.

In our view, therefore, no electronic bugging warrant should issue unless it has been approved by a body or tribunal, independent of the government. Whether such a body be a court or a special tribunal established for that purpose, we need not resolve at this point. Suffice it to urge that the government should not be able to exercise such power unilaterally and unreviewably. No tribunal of the kind we propose would be likely to refuse a warrant in a compelling case. But, being more independent of the political process, it might well be more demanding as to the time, character, and terms of the warrants it approves. Moreover, its mere existence could serve to deter the government from even requesting surveillance warrants in unjustified cases. In any event, independent scrutiny would constitute one of the few safeguards available in security matters.

On this issue too, the United States experience is likely to be instructive. Even in the security area, American law requires prior judicial warrants for the electronic bugging of Americans within the United States.[29] Despite these additional due process requirements, there is no indication that the United States is commensurately more vulnerable than Canada to these security dangers.

For such purposes, it is not necessary that the reviewing tribunal be empowered to substitute its judgment for that of the government as far as the magnitude of security threats is concerned. The reviewing tribunal could determine, where relevant, whether the requisite elements of the offence have been demonstrated and whether there are reasonable grounds to sustain the government's judgment.

Even that limited a role would help to minimize the abuses of any such electronic bugging power.

The reporting provisions of the Criminal Code are rather biased.[30] They require the government to report on the law enforcement benefits of bugging but not the privacy costs. Since the goal of the exercise is to enable the public more intelligently to evaluate the experience, we believe that the reporting requirements should be broadened. Like the American law, this country should require that the authorities tell us for each bugging installation how many people were overheard, how many conversations were involved, and how many of them were incriminating.[31] There is even some chance that such a reporting requirement could serve to discourage excessive bugging. The authorities would not like the record to show a level of surveillance disproportionate to the benefits secured. To whatever extent a domestic intelligence bugging power survives apart from the criminal law, the reports should also indicate the proportion of foreign to domestic surveillance.

Unfortunately, the Official Secrets Act provides no time limit on electronic surveillance for security purposes. In our view, there is no need for such open-ended and dangerous power. We believe that Canadian law should provide a time limit on the security side as it does on the criminal side. In view of the fact that renewals could be secured in appropriate cases, no legitimate state interest would be lost and certainly some measure of due process might be gained by providing for a time limit on such surveillance warrants. Again, it is significant that the U.S. law now includes this safeguard.[32]

Mail Opening

Of all the unlawful activity committed by the RCMP, mail opening appears to have been the most brazen. For many years, it was official RCMP policy to authorize mail opening in conscious defiance of the law.[33] Unlike the surreptitious entries, there has been little attempt to defend this practice as lawful. Indeed, the upper echelons of the Force centralized the authorization procedure on the precise ground that it was not lawful and was not likely to become so.[34]

Although Prime Minister Trudeau was far from apologetic about the general revelations of RCMP misconduct under his administration, he was openly contemptuous of those who criticized the illegal mail opening. Arguing that mail opening had led to the deportation of a Japanese terrorist, Mr. Trudeau attacked what he considered anomalies in the law. Why, he asked, is it permissible to obtain a search warrant to seize a letter immediately after its delivery to the intended recipient but not moments before while it is in the course of post? Since none of the other Western democracies lack a mail opening power, why should Canada? Without taking any forthright steps to prosecute or discipline the wrongdoers, the Trudeau government initiated instead a move to legalize the wrongdoing. During a recent session of the 1978 Parliament, first reading was given to Government Bill C-26.[35] Although the Bill ultimately died on the order paper, it will provide nevertheless a convenient basis for an examination of this particular surveillance technique.

On the criminal side, Bill C-26 provided for mail opening on judicial warrant to seize certain drugs and intercept communications with respect to such drugs.

In principle, the Canadian Civil Liberties Association cannot object to a power of seizure where contraband is concerned. But for such purposes, it hardly seems necessary to obtain a warrant, as the Bill proposed, for a 60 day period. Rather than analogize to electronic surveillance, such a power should be analogized more to search warrants. That is, if there are reasonable grounds to believe that a particular identifiable letter contains

contraband, a judicial warrant might issue for that letter alone. There is no reason why such matters cannot be handled on a case by case, letter by letter basis.

Moreover, it is not necessary to read a letter in order to determine whether it contains contraband. Indeed, for such purposes, it may not be necessary even to open the letter. In many cases, modern technology might well be able to detect the contraband in sealed envelopes. To the extent that this can be done, letters should not be opened unless they have been found first to contain the substances at issue. In those cases where the technology cannot perform this task, there would be an argument for opening letters reasonably suspected of containing contraband. Even in those situations, however, steps should be taken to minimize the reading of any letters that are found subsequently not to contain the impugned substances.

The proposed power to intercept communications raises different problems. The only way to determine whether a communication is relevant to the investigation of a criminal offence is to read it. But the very act of reading it constitutes an encroachment on the personal privacy of the parties involved. Moreover, unlike the situation with electronic surveillance which served as a model for Bill C-26, the contemplated "interception" may be wide enough to prevent the communication from reaching the intended recipient.

Another difference lies in the fact that most often only the statements of one side will be monitored. The replies, if any, are not as readily subject to interception. Of course, mail surveillance would be conducted generally on what is received rather than on what is sent. Thus, a person could attract police surveillance even if he were the unwitting and unwilling recipient of unilaterally incriminating communications from someone over whom he had no control.

Conversely, a guilty recipient could implicate his innocent senders. To whatever extent there were a warrant against his mail, numbers of their communications to him might fall, even coincidently, within its terms. Of course, the broader the terms of the warrant, the larger the number of innocent letters which would be subject to such intrusion.

On the other hand, as a weapon to enforce narcotics legislation, the power to read mail communications is of very limited value. What even partially sophisticated drug dealer would be likely to write incriminating statements in letters? A similar point was made by one of the RCMP's experts in these matters, Chief Inspector T.S. Venner. The following is an instructive extract from his evidence before the Commission.

> "In very few of these parcels or letters, or whatever, that are opened, is there any communication found therein. What we are talking about here is parcels or letters containing drugs; very seldom messages or communications... I think it is important, because again, I think there is a widespread belief that it is our intent to interfere with the privacy of communication, more so than with getting a hand on the contraband substance itself. And it is simply not the case."[36]

When we balance the enormity of the proposed encroachments on personal privacy against the paucity of the anticipated gains for law enforcement, we are obliged to oppose the suggested power for the interception of mail communications.

Alternatively, to whatever extent this regrettable approach survives, the powers should be handled more like search warrants than like wiretap authorizations. At the very least, therefore, amendments should be adopted more clearly providing that warrants could not issue for broad categories of letters not yet in existence. Moreover,under such an approach the lifetime of a warrant could not be as long as 60 days. The idea would be to restrict these powers, as far as possible, to particular and identifiable letters.

On the security side, Bill C-26 sought to apply the Official Secrets Act to the interception of mail communications as that Act now permits the electronic bugging of oral communications. Yet, neither in Parliament nor at this Commission has there been an adequate demonstration of the need for this proposed power. The most that the proponents have done is cite the contribution that mail opening made to the deportation of Japanese Red Army terrorist Toshio "Joe" Omura. Even in that case, however, the evidence has cast considerable doubt on whether the mail opening was really necessary. In any event, after more than 30 years of mail opening, one case would hardly suffice to justify the legitimation of such intrusive surveillance.

Apart possibly from imminent peril to life and limb, no such justification has emerged. Indeed, for the past number of years an interesting if unintended experiment has been taking place in this country.[37] In 1975, RCMP headquarters rescinded the policy of authorizing mail opening. We are unaware of any evidence or indication that the absence or reduction of such surveillance has rendered this country significantly more vulnerable to its enemies.

In raising such questions, we quite appreciate that the law already permits forms of surveillance which may be more intrusive than mail opening. In our view, however, this cannot constitute a basis for yet another encroachment on civilian privacy. Despite the existence of this Commission, our society does not have the luxury of starting from scratch. We are in the middle of history and not at the beginning. Since the operative standard of democratic government is no additional encroachment without justification, the onus remains on the proponents of mail opening to demonstrate its necessity. If anything, the existence of more intrusive techniques might occasion some valid arguments against them; but, by themselves, they cannot justify the creation of a new power.

As far as Mr. Trudeau's distinction between the delivered and undelivered mail is concerned, we must remember that, as a practical matter, the investigation of delivered mail is more likely to be known to the target. It will probably require a physical visit to his premises. His likely knowledge of the investigation will serve to reduce the incidence of abuse. Undelivered mail, however, is much more susceptible to surreptitious interception and, despite what the law might require, the transaction could more effectively be withheld from the target. In that way, such mail openings would be subject to the kind of abuse that is not as available with the more intrusive physical searches of premises. In any event, there is no basis for Canada to relax the test which must be imposed upon every proposal for additional police powers. The proponents must demonstrate its necessity.

Alternatively, even if a mail opening provision is adopted in the security area, it should not resemble the broad kind of intelligence gathering power which had been proposed within the framework of the Official Secrets Act. Canadian citizens and permanent residents should not be susceptible to such surveillance unless there are reasonable grounds to suspect a serious security related breach of the law, such as treason, sabotage, espionage, or serious violence impairing the operations of goverment. Alternatively, to whatever extent the broader powers of Bill C-26 manage to survive, they should be restricted in accordance with the above suggestions for electronic bugging. The mail of such people should not be opened without their consent unless, at the very least, there are reasonable grounds to anticipate, within the near future, the employment of serious force or violence to accomplish governmental change in Canada. In the case of foreign visitors, such surveillance should require reasonable grounds to suspect hostile intelligence activity on behalf of a foreign power.

To whatever extent this country legalizes mail opening, the procedural safeguards should be no less exacting than what was proposed for electronic surveillance. In some respects, because of the differences involved, there might be even greater procedural protection. At the very least, we would suggest the following:

a) prior warrants from a court or other independent tribunal
b) letter by letter permission
c) alternatively, statutory time limits on the length of surveillance
d) more comprehensive reporting, including distinctions between foreign and domestic surveillance, the number of people surveilled, and the number of incriminating and non-incriminating communications intercepted.

While surveillance of mail covers is not as intrusive as mail openings, it represents a sufficient encroachment on personal privacy that it should not be permitted at the complete discretion of the police and security authorities. Thus far, of course, it has not been unlawful. At the very least, however, it should be made subject to the kind of standards and safeguards which we recommended for electronic bugging.

Entry, Search,and Seizure

The Canadian Bill of Rights declares the right of people in this country to "security of the person" and "the enjoyment of property" and "the right not to be deprived thereof except by due process of law".[38] To the unwitting laity, the words "due process of law" would appear to imply the need to satisfy some exacting standards in order for the authorities to invade our persons and property. Apparently, however, this is a legal mirage.

At least, such was the finding of the Pringle Royal Commission[39] which was set up a few years ago to inquire into the propriety of the controversial Fort Erie search and strip raid. Assisted by the RCMP,the Niagara District Police in the spring of 1974 conducted a drug raid in a small Fort Erie hotel. By the time they had finished, they had searched virtually all of the 115 patrons on the premises. In the case of the 35 women patrons, the police had them herded into washrooms, stripped, and subjected to vaginal and rectal examinations. Despite all of the searching, stripping, and inspecting, the police found nothing more incriminating than a few grains of marijuana. And most of them were found, not on articles of clothing or within body orifices, but rather on the floor and tables of the lounge. While the intrusive aspects of the raid were described as "foolish" and"unnecessary", the Pringle Commission found, nevertheless, that they were lawful.[40]

In the quest for illicit drugs under the Narcotic Control Act, the police are entitled, without warrant, forcibly to enter any place other than a dwelling house and conduct a search.[41] Even though it may not have been strictly necessary, all parties conceded that in this case it was reasonable to suspect that such drugs were in the hotel. It was not considered reasonable, however, to suspect so many of the patrons. But, according to the the Pringle Commission's interpretation of the Act, the police in such circumstances may search everyone found on the premises whether or not each search is accompanied by reasonable suspicion.[42] All it takes to render a person lawfully vulnerable to such intrusions is the coincidence of being innocently present on suspicious premises. Unfortunately, the "due process" requirement of the Bill of Rights may not suffice to rescue innocent persons from such encroachments.

But, as a matter of policy, why is it necessary for the RCMP or any other police in this country to have such a dragnet power to search? Why would it not suffice if the susceptibility to such searches were confined to persons under reasonable suspicion? Despite the bars elsewhere in the criminal law against dragnet searches, there has been no serious suggestion that in those areas society is suffering from a consequent lack of adequate protection.

Together with our customs and excise laws, our drug laws contain another unique search power. Under these laws, there can be forcible searches, without specific judicial warrants, even of private dwelling houses. Such invasions are made possible by the preservation in these laws of writs of assistance which are general search warrants carried by certain RCMP officers.[43] While the officers who possess them need to have a reasonable belief that the homes they enter, in fact, contain evidence of drug, customs, or excise violations, they need not demonstrate this to a judge in advance. Prior to the search, they need to persuade only themselves. Even though self-persuasion does not qualify as an exacting test, our courts have already held that "frightening" as they may be, writs of assistance do not violate the "due process" requirements of the Bill of Rights.[44]

But, again as a matter of policy, why should our law continue to permit them? The forcible search of private homes for evidence of most crimes in the Criminal Code requires the police first to persuade a judge or justice of the reasonableness of what they are about.[45] There has been no serious suggestion that this requirement has obstructed unduly the battle against these crimes. Why, then, should it be dispensed with in the battle against violators of our customs, excise, and drug laws? Why, for example, should the hunt for illicit marijuana give the police more power to impose upon the privacy of our homes than the hunt for the proceeds of a robbery or the evidence of a murder?

Moreover, as we have seen, some of these special laws empower the police to enter and search places, other than dwelling houses, at any time and without any kind of a warrant, not even a writ of assistance. Indeed, for such purposes, they may not even require a reasonable belief that the premises in question contain what they are seeking. Yet, in the quest for evidence of most crimes in the Criminal Code, the police need specific judicial warrants to search all places.

What, if anything, is there about customs, excise, and drug violations that justifies the existence of such unique police powers? It would be difficult to argue that these powers were justified by the inherently more horrendous quality of the offences involved. There would hardly be a consensus in our community that smuggling, for example, represented a greater affront to our moral values than murder. William Kelly, a former Deputy RCMP Commissioner, argues for these special powers "because the nature of the offences would permit the evidence sought by the police to be easily disposed of if the police had to leave the scene to apply for a search warrant".[46]

But not all evidence in connection with these offences can be so "easily disposed of". What about, for example, smuggled television sets? Moreover, customs, excise,and drug offences have no monopoly on disposable evidence. Consider, for example, the number of thefts, robberies, counterfeits, or even murders which involve disposable things like documents, dollar bills, and jewels. Along with illicit drugs, such items can readily be flushed down tiolets or thrown into garbage incinerators. Mr. Kelly's argument hardly constitutes, therefore, a basis for the existence of unique search powers under the statutes in question. What he says could apply to any criminal case involving readily disposable evidence.

In our view, there is simply no sound basis for the existence of an entry, search, and seizure power in these RCMP enforceable statutes which is so much greater than what is contained in the Criminal Code. Accordingly, the Canadian Civil Liberties Association recommends the abolition of all these special entry and search powers. The prior acquisition of specific judicial warrants should be no less necessary for these matters than they are in the general quest for evidence under the Criminal Code. Moreover, these statutes should not permit individuals to be searched unless they personally are suspected, on reasonable grounds, of the wrongdoing in question.

On the security side, where the seizure of communications is concerned, the Official Secrets Act contains provisions which arguably could permit the RCMP also to enter and search without evidence of unlawful conduct.[47] Like the situation with electronic bugging, this appears to be a broad intelligence gathering power. Nothing, however, appears to prevent any evidence acquired this way from being used in subsequent prosecutions. But it doesn't have to be. Indeed, the Official Secrets Act unlike the Criminal Code, might permit the entry, search, and seizure to be made in an entirely surreptitious fashion without any notice whatsoever to the target or lawful occupant of the premises.

It is significant that as recently as 1976, the Americans reported no surreptitious entries apart from the installation of electronic surveillance devices.[48] Perhaps even more significant is the fact that since that time no such power has even been sought for American domestic matters. For those purposes, surreptitious entry is confined to electronic bugging. And even in those situations, there must be probable cause to suspect certain crimes, prior judicial warrants, and in most cases subsequent notice to affected parties.[49]

For the reasons already indicated, it is difficult to justify powers of surveillance in this country which are so much broader than those which exist in the United States. Accordingly, the Canadian Civil Liberties Association recommends that the Official Secrets Act be amended so as to eliminate the possibility of surreptitious entry without bugging in domestic security situations. As far as foreign security threats are concerned, we believe that the standards and procedures in the Official Secrets Act should be considerably tightened. Canadian citizens and permanent residents should not be vulnerable to such surreptitious entry unless there are reasonable grounds to believe that there are serious security related breaches of the law on behalf of foreign powers. And, in the case of foreign visitors, such surreptitious entry should require reasonable grounds to suspect hostile intelligence activity on behalf of foreign powers. Once again, we would urge that such intrusions require prior warrants from a court or other independent tribunal.

So often when the issue of forcible entry is discussed, the proponents cite the hypothetical possibility of some imminent and overwhelming emergency. Prime Minister Trudeau, for example, invoked a possible need for a warrantless entry to deactivate an atom bomb which was slated to explode within a short period of time.[50] Despite the fact that Mr. Trudeau's illustration had no conceivable application to the context in which it was raised, the break-in against the Parti Quebecois, the law might nevertheless provide some narrowly defined exceptions to any general requirement for a warrant. The greater and more imminent the peril, the more arguable the basis to relax the normal safeguards. Even at that, however, the onus should be on the police to demonstrate after the event their reasonable belief that the imminence of the peril left no time for them to prusue a judicial warrant in advance. Since the apologists for civil liberties violations are so often adept at confusing these issues with all kinds of hypothetical possibilities, it might be useful for the Commission to articulate, once and for all, the limits of an "imminent peril" justification for warrantless entry.

Informing and Infiltrating

In the words of the Church Committee of the U.S. Senate, "the most pervasive surveillance technique has been the informant".[51] While there are not now available comparative statistics with respect to surveillance techniques in this country, there is no reason to believe that our experience would differ substantially from what obtains in the U.S.

Yet it must be acknowledged that the use of secret informers is highly intrusive to personal privacy and dangerous to political liberty. Unlike the physical search, the electronic bug, and the opening of mail, the informer not only spies but he also participates. If he is sufficiently charismatic, he can effectively distort the political activities of the voluntary sector. Indeed, he might provoke some of the very illegalities that he has been directed to detect. Consider, for example, the following account in relation to William O'Neal, an FBI informer who had been planted in the Black Panther Party.

> "O'Neal's beginning as one of the Bureau's most highly paid informants began, as a great many of them do, when an FBI agent recruited him while he was in jail. Intelligent and aggressive, he joined the Black Panther Party and rapidly rose to be the Chicago BPP's Chief of Security. It is an appropriate irony that as Chief of Security his major interest was in ferreting out informers. To this end, he constructed an electric chair...,organized groups to carry out robberies (and accused those who didn't want to take part of being informants), wrote articles in the BPP newspaper denouncing various people as being informers, and used a bullwhip on 'suspected' informers. He also provided explosives to Panthers and arranged for their arrests, and he formulated a plan to send a model airplane loaded with a bomb flying into City Hall....FBI files...show that the FBI was pleased with his activities".[52]

Apart from professional police undercover operatives, informers are often unstable and disreputable people. In this connection, it is interesting to note that Sarah Jane Moore, the woman who had attempted to assassinate former U.S. President Gerald Ford, was an FBI informer.[53] The untrustworthy character of so many of these informers has led intelligence agencies to assign numbers of them to the same place so that they don't know of each other.

In the result, much of their time and work involves spying on each other. At one time, for example, the FBI infiltration of the American Communist Party was so extensive that there was one informer for every 5.7 genuine members.[54]

In those cases where financial remuneration is the chief incentive, the informers may be tempted to distort and exaggerate in order to maintain their value to the police agency which is paying them. If nothing much is happening, the intelligence agency is not likely to go on paying in perpetuity. Such considerations would contribute also to the informer becoming an agent provocateur.

In view of all these dangers, it is difficult to understand the virtual absence of controls over the use of informers in current Canadian law. No doubt, the defenders of the informer system will be quick to adopt the reasoning of the U.S. Supreme Court: "the risk of being...betrayed by an informer...is the kind of risk we necessarily assume whenever we speak".[55] There is, of course, some truth in this. Unlike taps, bugs, mail opening, and physical searches, there is some control over whom to trust. The risk of betrayal is an unavoidable component of human intercourse.

At most, however, such arguments might militate against the <u>amount</u> of control over informers as compared to other forms of surveillance. But they cannot justify the virtual absence of any control. In the opinion of the Canadian Civil Liberties Association, the use of informers represents a sufficient danger to our fundamental freedoms to necessitate the adoption of some control mechanisms.

Unlike the other forms of intelligence gathering, the use of informers may require more time. As the U.S. General Accounting Office once observed, some of the target groups will be "difficult to penetrate because of their elaborate security procedures and cell-like organizational structure".[56] The GAO believed that there may have to be a period of observation and contact in order for the informer to gain the group's trust. These considerations might create an arguable case for a

somewhat more flexible standard where informers are concerned. Perhaps, therefore, it would be permissible for the security service to target informers at Canadian citizens, permanent residents, or groups composed primarily of such people where there are reasonable grounds to anticipate a serious security related breach of the law within the near future.[57] Foreign visitors and organizations of which they are the primary constituents might also be targeted for informers where there are reasonable grounds to anticipate hostile foreign intelligence activity within the near future.

It will not suffice for the law merely to establish the criteria. Procedural checks will also be required. In view of the political sophistication which is involved in security targeting, the deployment of informers for these purposes should require, at the very least, early approval from the highest level of the security service. And, in view of how intrusive and threatening security infiltrators can be, the continuation of their deployment should require the approval of the Federal Solicitor General, himself. After an informer has been in place for no more than a few months, the Solicitor General should be required to review the propriety of the targeting. Does the individual or group targeted meet the criteria? Do the security benefits of the information provided justify the civil liberties costs which the informer is creating? Since the approval of the Solicitor General is now required for security interceptions of private communications, there is no reason to balk at his involvement in respect of the use of informers. In a later section of this brief, we will make some recommendations for making all of these decisions susceptible to the scrutiny of an independent ombudsman.

The difficulties in targeting are equalled, if not surpassed, by the difficulties in determining the range of permissible behavior once the informer is in place. In order to gain the trust of the targets, the informer may feel compelled to commit unlawful acts. If he succumbs to such pressures, we will have a situation where the government is subsidizing illegal behavior. Understandably, the directors of the RCMP Security Service have sought guidance from the Federal Government as to how they might address this difficulty.[58]

In the opinion of the Canadian Civil Liberties Association, the question of infiltrator misconduct has been handled unsatisfactorily in the past. To the extent that such activity continues, it should not be left so completely to administrative discretion. It should be the subject of statutory criteria. Indeed, because of the risks involved, the applicable statute should contain the most stringent regulations. Certainly, for example, acts of violence could not be tolerated. Moreover, while an infiltrator might be permitted to participate in some non-violent illegalities, he should not be entitled to instigate them. Infiltrators should also be bound by a test of necessity. There should be a requirement that their involvement in misconduct be necessary to protect their cover.

The code of permissible behavior would also require some system for measuring relative harms. The infiltrator's misdeeds would have to be of a clearly lesser magnitude than what he has been assigned to watch and detect. Obviously, laws involving moral turpitude would require more sacrosanct treatment than regulatory ones. By the same token, there would have to be much stricter standards in situations where there was a victim than in those situations where such was not the case. As one such possible standard, consideration might be given to allowing an infiltrator's participation when there is a particularly strong basis to believe that if the victim knew he would consent. .Such a possibility existed recently, for example, when a police infiltrator in the Western Guard allegedly helped to smear swastikas on the property of some black and Jewish people.[59] If the property owners had known the infiltrator's participation in the vandalism was designed to apprehend their racist tormentors, they might well have consented.

To leave open such doors, however, is to perpetuate some disquieting risks. The foregoing suggestions are designed, therefore, simply to indicate possible directions for such a legislative enactment. To be sure, these suggestions would have to be augmented by many more and all of them would have to be articulated in the most precise language. But even that could not suffice. Substantive standards need the reinforcement of procedural safeguards. At the very least, it would be necessary to ensure the most careful scrutiny by the highest levels of the security service. Indeed, RCMP headquarters should be required to provide advance approval for the range of misconduct in every operation. Such approval would be amenable also to our subsequent recommendations for oversight by the independent ombudsman.

The use of informers will need additional safeguards. There should be specific prohibitions against undue interference with the lawful activities of the persons or groups which have been targeted for infiltration. While it is unavoidable that many, if not most, infiltrators will be paid for their efforts, there should be a ban on giving them commissions according to the weight or value of the information they relay. In other words, the payment system should not, in itself, encourage distortion and exaggeration. Just as electronic bugs should not be intercepting privileged communications, so should informers not be intercepting them. In the event that they unavoidably become privy to a privileged communication, they should be prohibited from disseminating it. To the extent that an informer becomes a witness for the prosecution, the Crown Attorney should be obliged to reveal to the Court the witness' role as an informer together with an accounting of the money that has been paid for such purposes. In that way, the jury would be enabled to assess the weight of the informer's testimony and the accused would be enabled to seek redress for any wrongful injury which the informer may have caused him.

As a further and necessary safeguard, it is time that Canadian law created for accused people a defence of entrapment. To the extent that undercover agents or informers provoke or encourage a violation of the law in circumstances where there is a reasonable doubt that the accused would otherwise have committed the offence in question, the law should require the dismissal of the charge. The creation of such a defence would serve to deter informers from acting as agents provocateur or, if that were not successful, at least to protect an accused person against a conviction based upon such improper conduct. If nothing else, a defence of entrapment would reduce the damage which such police conduct inevitably inflicts on the administration of justice.

The Commission has heard a significant amount of testimony concerning the recruitment of informers or "human sources" as they are called. From the testimony which has been adduced here, it appears that RCMP pressure tactics have included the following:

- the boxing in of a potential source's car in order to scare him
- a fifteen hour grilling
- a forcible holding of a source for 4 hours
- the holding of a source over night without charging or prosecuting him
- the use of personal information from a source's private life in order to encourage his collaboration.[60]

To the extent that such tactics qualify as unlawful arrests and assaults, they clearly fall outside of the permissible recruitment measures. In our view, it should also be improper to pressure a potential source by threatening to expose personal information about his private life. For reasons which we will develop more fully later on, the intelligence gathering exercise should not include the acquisition, retention, and dissemination of information which is not otherwise relevant to the commission of security related offences or hostile intelligence activity. While the process of gathering intelligence might unavoidably include information beyond what is sought, the law should attempt to curtail how much of it might subsequently be retained and disseminated. On this basis, it would be improper for the law to permit such data to be used as a source recruitment technique. Since it is questionable whether the material should be kept, it is clear that such a use should not be tolerated.

It may not be inappropriate, however, to offer some potential sources relief from the consequences of the unlawful acts they have committed. Since such people are properly subject to the legal processes of arrest, prosecution, and imprisonment for their unlawful deeds, they may be fair game for the exercise of compassion in the event that they help rid the community of even more dangerous elements. On this basis, it would be arguably permissible for the RCMP authorities to offer such wrongdoers relief from government instigated prosecution, early parole, or even helpful recommendations for leniency in court. Even at that, however, there must be some sense of limits. People should not be required to become indentured slaves to the RCMP security service. Perhaps one practical way of building a safeguard into any propensity for excess, would be a legislative restoration to the courts of the power to stay proceedings for abuse of process. At the very least, the courts should be empowered to

ensure that their processes are not used to impose unfair or unduly oppressive conditions on potential informers. Of course, an obviously permissible recruitment technique is the payment of money for information services rendered. But, as already indicated, the details of such relationships should be the subject of compulsory disclosure to the courts in any situations where the informers are used as witnesses.

It may very well be that the adoption of any such control system could lead to some reduction in the number of informers at the disposal of the security service. There is no reason to believe, however, that any such reductions would be unduly injurious to Canadian security interests. In this connection, it is significant to note again the substantial decline, within a very short period, of domestic informers in the United States. Yet there is no indication that American security has been unduly undermined. As late as the summer of 1978, the director of the FBI was able to assure the U.S. Senate that voluntary, not co-opted, informants represent "the most effective tool that we have".[61] That statement is likely to be even more true of a less polarized country like Canada. It should be clear, of course, that none of our proposed controls would curtail the free flow of voluntary information.

Access to Personal Data

In order to plan intelligently and provide a complex level of services, our governments collect mountains of information about us - assets, debts, income, employment, aptitudes, health, sickness, family background, etc. So vital is this data to government operations that in numbers of situations, the law affirmatively requires that we furnish the facts which government seeks. In such situations, the balance between personal privacy and government "need to know" is a legal obligation on the data collectors to keep confidential the contents of individual files. The uses of the information are confined to the purposes for which it was collected.

One of the most sensitive examples of this phenomenon is the Income Tax Act. In order to levy a fair and just tax upon us, the revenue authorities must have the opportunity to probe deeply into our respective circumstances. In order to keep the intrusions to a tolerable minimum, the Act requires us to complete an annual return in which we take the responsibility for disclosing what is relevant. By and large, this works well to limit the involvement of the revenue agents in our daily lives. A very key reason for the success, however, is the taxpayers' confidence that the data they reveal are not generally available for anything but tax purposes.[62] Indeed, such a restriction has existed in the law since the inception of the income tax.

It is not difficult, therefore, to understand the public indignation which was provoked by the revelations of RCMP access to tax data for non-tax purposes. It was nothing short of a breach of faith with the Canadian taxpayer.

The relationship between the RCMP and the revenue authorities was formalized by an agreement in 1972.[63] Although the war on organized crime was the goal of the agreement, the Income Tax Act was its method. RCMP officers in the directorate of criminal investigations were to become "authorized persons" for the purpose of the administration and enforcement of the Income Tax Act. On that basis, they were entitled to receive identifiable tax information.

Unfortunately, the actual practice departed from the terms of the agreement. According to the evidence before this Commission, more than 50 examples at least were provided where tax information was used for purposes other than the Income Tax Act.[64] In some cases, material was disseminated to RCMP officers beyond those in the designated directorate, for example, the drug section.[65] In some cases, this information was given even to other police departments, for example, the Cornwall Municipal Force.[66] The uses which were made of material exceeded not only tax matters but also the war on organized crime. One such use, for example, was to locate missing persons.[67] Indeed, according to an RCMP witness, "the income tax program is very effective not only against 'organized crime' but, if necessity dictates, against the perpetrators of any crime".[68]

One of the defences invoked by RCMP witnesses was that much of the tax information they received was biographical, not financial. Sergeant Pobran, for example, testified as to his belief that the exchange of biographical data did not violate the income tax restrictions. He said that he would be quite prepared to provide such data to another police officer for a non-tax investigation. Pobran said that he was assured by a superior that such a communication would not be objectionable.[69]

Not the least of the problems occasioned by the 1972 agreement was the fact that there was no definition for "organized crime" and no uniform system for designating targets. According to at least two of the witnesses, "organized crime" means two or more persons involved in some criminal activity on a continuing basis.[70] A vivid imagination is not necessary in order to conceive of the infinite abuses which could arise from the application of such a definition. Moreover, the targets for the program were usually selected at the local level. A random survey of some 20 files uncovered at least 5 questionable targets. Why, asked Commission counsel, should "five persons who are not the subject of any recent police intelligence reports of value and no indication (that they are) earning income through illegitimate means...continue to be designated as targets".[71]

With the possible exception of some imminent peril to life or limb, the Canadian Civil Liberties Association is of the opinion that no case has been made for a statutory power of RCMP access to tax records for non-tax purposes. The reported law enforcement benefits from the RCMP's past access do not, in our view, outweigh the potential civil liberties costs. Any breakdown in the tax system of self-assessment is likely to precipitate a larger measure of government intrusion in our private lives. As a practical matter, the revenue authorities will not be divested of their appropriate income. If a significant number of taxpayers begins seriously to falsify their returns, more and more people will be susceptible to government investigation. That is why it is so important for taxpayers to believe that their returns will be treated in confidence.

Nor is there any basis for the distinctions which have been drawn between financial and biographical data. Who and what can determine the categories of material which should be treated in confidence? In some cases, certain biographical matter might be more sensitive than financial matters - for example, the identity and number of dependents. Since all of this material is the subject of mandatory disclosure, it should all fall within the confidential restrictions.

If anything, the current statutory restrictions could be tightened even further. The exception, "in respect of criminal proceedings", may be needlessly broad. At the very least, there should be a necessity test. Tax information should not be admissible in non-tax criminal trials unless its necessity has been demonstrated. For such purposes, any prosecutorial attempt to subpoena tax records should require prior notice to the target and an opportunity for the target to make representations in court against the transmission of his records.

Moreover, there should be additional restrictions on the use of RCMP officers for the enforcement of the Income Tax Act. Although many of them can now qualify as "authorized persons" it is not adviseable for them to be designated this way. The public cannot be expected to believe that RCMP officers will deny information to their colleagues. The continued employment of RCMP officers in tax enforcement is likely to erode public confidence in the self-assessment scheme.

Less Intrusive Techniques

There are, of course, less intrusive techniques of surveillance. These might include such methods as watching, trailing, interviewing, and source checking. While they need not necessarily attract the kind of regulatory mechanisms that have been proposed for the more intrusive techniques, their use should not be as open-ended as the law now permits.

It is our view that when the security service investigates by the employment of even such less intrusive techniques, it ought to be governed by discernible standards and specific controls. Again, there might be a lower standard for foreign visitors than for citizens and permanent residents. A distinction might also be drawn between preliminary and deeper investigations - the latter requiring a higher standard.

While a decision to investigate with such techniques might be made initially at the field level, it should be subject to mandatory review by headquarters within a reasonable period thereafter. RCMP headquarters might be empowered to renew that level of surveillance for additional periods, intensify it using some of the other techniques if the facts warrant it, or terminate the investigation completely. Like the situation with other forms of surveillance, the use of these techniques for security investigations would also be subject to the scrutiny of the independent ombudsman.

THE FOLLOW-UP TO SURVEILLANCE

Deterring, Preventing, and Countering

Obviously, the mere gathering of intelligence may not suffice. There must be some ability to use the data in the public interest. Suppose, for example, that RCMP surveillance of certain individuals and groups revealed that the targets were or were soon likely to become involved in serious violence which would impair Canadian government operations or espionage on behalf of a foreign power. Again, it is obvious that the RCMP must have some power to counteract the harms which the targets may be causing.

Of course, there is the power of arrest and prosecution. Or, if the matter at issue falls within the investigative jurisdiction of another police department, the RCMP must certainly be permitted to turn over the data in its possession.

There are times, however, when these traditional forms of law enforcement are not appropriate. In some circumstances, for example, the surveillance might be sufficient to satisfy the RCMP that there is misconduct but the evidence may be less than adequate to produce a conviction in court. A premature prosecution could lead to acquittals and foreclose the bringing of the same charges later. In some situations, the RCMP might prefer to wait until they can penetrate to even higher echelons of the conspiratorial operation concerned. An early prosecution might blow the cover of informers and infiltrators. In the case of foreign espionage operations, these considerations would be even stronger. As indicated earlier, foreign powers will frequently be able to replace those of their operatives who get caught.

Such considerations might help to explain the 1975 mandate instructing the RCMP Security Service to maintain internal security "by...deterring, preventing, and countering individuals and groups" when their activities fall within the enunciated criteria.[1] In practice, this mandate has been applied so as to authorize a wide variety of "dirty tricks" even within the domestic arena. There is evidence, for example, that the RCMP break-in against L'Agence de Presse Libre was designed to create disruption among the FLQ and its sympathizers.[2]

Chief Superintendent Donald Cobb testified before this Commission that he was the one who issued the supposed FLQ communique denouncing Pierre Vallieres. Earlier, Mr. Vallieres had publicly renounced violence and terrorism. He had urged his followers to join the more moderate and democratic Parti Quebecois. But Superintendent Cobb feared that an influx of potential terrorists and Marxists would undermine the democratic character of the Parti Quebecois. Since he believed that Vallieres' conversion was not sincere, Cobb felt no moral qualms about any harm that the communique would do to him. The RCMP superintendent testified also as to his belief that the communique was not likely either to incite additional violence by the terrorists or to cause local police to undertake additional investigations. Moreover, according to Cobb, his action was within the law and the terms of the mandate.[3]

To what extent, however, is it appropriate for a police authority to tamper in this way with the democratic political processes? Cobb's action could have effectively discouraged support for the democratic P.Q. While there is an element of political sophistication in Mr. Cobb's judgments, he nevertheless could have been wrong about the sincerity of Vallieres' renunciation of terrorism. To those in the extremist movement who were otherwise susceptible to Vallieres' leadership, Cobb's communique could have exerted a harmful influence. In any event, is it the role of the RCMP Security Service to deny members and supporters, no matter how tenuous their views, to a democratic organization like the Parti Quebecois?

Another "dirty trick" surfaced at the hearings of the Krever Commission into the Confidentiality of Health Records in Ontario. The evidence indicates that in at least one case the RCMP used secretly obtained information in order to foment dissension within the ranks of a Trotskyist organization.[4] Apparently, the RCMP circulated, among members of this group, some psychiatric data about one of the officers. The material was supposed to discredit him. The public has not learned why the RCMP employed this seemingly outrageous tactic against Canadian Trotskyists. The attempts of the Krever Commission to probe this matter were confined to in camera testimony. It is difficult to imagine what security dangers the Trotskyists

were creating. Almost forty years of intensive FBI investigations of their American counterparts failed to produce a hint of such law-breaking.[5] Without question, Trotskyist rhetoric is frequently menacing or at least offensive. But, in North America, there is little indication that their behavior has matched their rhetoric.

In all these examples of "dirty tricks", the RCMP were acting not simply as investigators but also as judges. They were deciding guilt and imposing sentences. In the case of Pierre Vallieres and the Trotskyist officer, RCMP officials subjected them to certain punishments on the strength of their own unilateral judgments. In such cases, the punishments can easily extend beyond the intended victims. While the fake communique was targeted at M. Vallieres and his former FLQ associates, it may also have affected the membership roster of the legally innocent and politically democratic Parti Quebecois. Even if some of the Trotskyists had been involved in unlawful activity (as yet unproven and even unrevealed), the "dirty tricks" perpetrated against them must inevitably have affected lawful activities as well.

Some of the "dirty tricks" might have found sustenance in an internal RCMP memorandum which talked about "disruption, coercion, and compromise". These words appeared capable of meaning different things to the various witnesses. In the case of one document, however, the message was far more explicit. It frankly encouraged the use of "power struggles, love affairs, fraudulent use of funds, information on drug abuse, etc. to cause dissension and splintering of the separatist-terrorist groups".[6] Despite the obvious ethical problems which such tactics involve, there appeared to be few conscience qualms about resorting to them. In reference to the "disinformation" involved in the fake communique, Superintendent Cobb, for example, said, "I believe that there is every reason to consider using it again if ever a situation arises in which it would be likely to make a useful contribution".[7] Moreover, when asked about the "dirty trick" perpetrated against the Trotskyists, former Solicitor General Warren Allmand expressed his endorsement.[8]

Reeling under the impact of the FBI's covert "dirty tricks" or COINTELPRO scandals, the Americans have been moving in the opposite direction, notably in the domestic arena. The U.S. Senate Church Committee, for example, would "prohibit a Bureau agent from mailing fake letters to factionalize a group".[9] A draft guideline prepared a few years ago by former Attorney General Edward Levi explicitly prohibited the FBI from "disseminating information for the purpose of holding an individual or group up to scorn, ridicule, or disgrace" and "disseminating information anonymously or under a false identity".[10]

Some eminent American experts have expressed the view that in the domestic arena such prohibitions would not seriously undermine the ability to maintain internal security. Apart from the power of arrest and prosecution, the intelligence agency can alert a potential victim of violence, take physical measures to protect him, engage in "deterrent interviewing" of those likely to commit violence, block access to weapons, and disarm explosives.[11] In short, a bar against "dirty tricks" would hardly denude the intelligence agency of a capacity to retaliate. In this connection, it is significant to note that, as a matter of fact,a recent GAO audit found no FBI resort to COINTELPRO activity in its domestic program.[12]

In the case of foreign powers, their reduced vulnerability to domestic law enforcement creates an argument for some additional ability on the part of the intelligence community to engage in deception and confusion. Indeed, the ability to mislead may be one of the few weapons which can effectively frustrate hostile foreign intelligence activity. Even there, however, the Americans have been moving to limit the scope of the permissible dissemination of data. Note, for example, the recent U.S. Senate Bill S2525 which would require, among other restrictions, that the dissemination of information concerning an American pose no risk to his physical safety.[13]

In view of these trends in the United States, it is hard to appreciate the tolerance of "dirty tricks" which has been expressed in this country. These tactics are no less at variance with our morality and no more necessary to our security than they are in the United States. In this connection, it is useful to recall just how flexible Canadian law is even without "dirty tricks". Section 27 of the Criminal Code, for example, empowers anyone not only the police to use as much force as is reasonably necessary to prevent the commission of a crime which threatens imminently to cause serious harm to persons or property.[14] Our law also preserves the common law defence of necessity under which even otherwise illegal acts might be committed to prevent certain more serious illegal acts when such are imminent.[15] On the basis of all these considerations, therefore, we would recommend that the law in this country move in the direction of prohibiting these COINTELPRO type activities in the domestic arena and imposing additional restrictions on them in the foreign arena. There is good reason to believe that the adoption of such an approach would enhance the state of our liberty without undue loss to our security.

The Retention and Dissemination of Surveillance Data

It may be difficult for the intelligence gathering exercise to discriminate. Once an authorized investigation begins, there will be a tendency for the security agency to accumulate all of the information it can. Moreover, since the investigators cannot always assess the relevance of every piece of data, they will be tempted to report and retain virtually everything they acquire. Very likely, therefore, vast amounts of irrelevant personal data will find their way into RCMP files. Yet, according to our U.S. colleagues, the American Civil Liberties Union, such information "is the single most effective tool for political manipulation at the disposal of the government".[16.]

Indeed, we have already referred to some of the questionable uses which the RCMP has already made of personal data in its possession. But, even apart from some of the "dirty tricks", it is unfair for any such agency of government to retain identifiable information which has been gathered from the private lives of citizens and permanent residents - unless, of course, it is relevant to the security or law enforcement purposes which occasioned its collection. In our view, human dignity is diminished to the extent that personal data pass out of an individual's control. On this basis, we believe that the law should be amended so as to restrict and regulate what identifiable data may be retained and disseminated by the RCMP Security Service.

Essentially, the test must be one of relevance. The RCMP should not retain or disseminate personally identifiable information unless it is relevant to authorized security or law enforcement functions. In the domestic arena, for example, surveillance data might be retained and disseminated in order to save lives, prevent some impending crime, or build a case for prosecution. In the foreign field, surveillance data might be retained or disseminated in order to frustrate the activities of an espionage ring, assess other foreign intelligence, or build a case for prosecution. Both domestic and foreign material might be retained and disseminated in order to evaluate some person's fitness to hold a classified government job or someone else's reliability as an informer. In our view, the law should set out the standards and categories of authorized recipients for

identifiable surveillance data. Moreover, it should provide time limits on retention (less for domestic than for foreign purposes) and an explicit requirement for the destruction of material and, where appropriate, entire files, that are not necessary or relevant for authorized security or law enforcement purposes.

Again, the accompanying procedural safeguards will be crucial to the implementation of any statutory scheme. In this regard, a useful beginning has already been made through the federal Human Rights Act.[17] According to that Act, Canadian citizens and permanent residents have certain rights of access to federal government files which contain data about them. The existence and exercise of such a right could help to deter and redress the excessive retention and dissemination of personal data. Indeed, it might even serve to reduce the injuries caused by the exchange of inaccurate and false material.

As might be expected, however, there are certain exceptions to this right of access where national security and law enforcement are concerned. While it would be difficult to question the propriety of some such exceptions, there are areas in which this statute appears to go too far. Some of these exemption criteria, for example, do not even address themselves to the question of injury. They would permit the withholding of government material regardless of prejudicial effect. Consider, for example, the exemption for information obtained or prepared in the course of investigations relating to crime detection generally.[18] Why suppress material simply because it arises in the course of such investigations? An arguable case might be made for withholding information in a particular investigation which is seen as harmful to our anti crime efforts. But it is hard to fathom the justification for such an exemption which doesn't even consider the question of harm. Moreover, in view of the vagueness and potential breadth of the term "national security",[19] the Act should be further amended so as to express more precisely and narrowly just what interests are entitled to this exemption from access. In this connection, consider, for example, the possible substitution of such terms as "physical safety and defence".

Perhaps even more contentious is the power which the Act confers on the relevant cabinet ministers to exempt, decline to acknowledge, and simply to withhold those files and information which, in their opinion, fall within the specified categories of exemption. If a citizen disputes the minister's opinion, he has resort only to the Privacy Commissioner. Unfortunately, the powers of this official are too limited. She cannot exercise the power of a court to compel; she can exercise only the status of an ombudsman to persuade.

Traditionally, ombudsmen have been used as a check against the exercise by cabinet ministers or civil servants of relatively open-ended discretionary powers. In this Act, however, the ministerial power is not supposed to be open-ended. It is supposed to be exercised according to certain specified criteria. But, since the minister's application of these criteria cannot be overruled, his discretion, in fact, could become open-ended. In this sense, the Act embodies an unhealthy combination - the appearance of limited power and the reality of virtually unlimited power.

Even in those situations where the exercise of ministerial discretion were legally correct, there is a great risk that it would not appear so. As politicians, the judgments made by cabinet ministers in such areas will often appear to be influenced more by political self-interest than by the statutory criteria. On this basis, the Canadian Civil Liberties Association would recommend that governmental claims to such exemption be subject to review and reversal by the courts or some other independent tribunal which would have access to all of the material at issue.

As we will indicate more fully later, there should also be an independent ombudsman with complete access to the RCMP's security and law enforcement material. Even in the absence of a request for access on the part of an affected person, the ombudsman should periodically inspect and audit the retention and dissemination performance. This too could provide an opportunity for deterrence and redress.

POLICING THE POLICE

Instruments of Retaliation

There is little point in going through the delicate exercise of attempting to achieve a reasonable balance of surveillance powers unless the public can be satisfied that the police and security forces will be effectively contained within those allotted powers. We believe, therefore, that a priority function for this Commission involves the examination of the measures which are currently and potentially available to restrain excesses of police power.

At the moment, offending police officers are subject to criminal prosecutions, civil lawsuits, and departmental discipline. Unfortunately, these sanctions are beset by a number of problems.

Criminal prosecutions are handled usually by the same government department (Attorney General) which is involved in daily cooperation and association with the police. Because of this, there is reason to fear that prosecutions of police will not be as vigorously pursued as prosecutions by police. And, when the accused is a police officer, it is not expected that fellow officers would perform the kind of conscientious investigation that characterizes their other work. A fortiori, this would be true in a case where the victim of the police misconduct was a member of a minority political sect which was generally in conflict with the mainstream values of society. As an example of this phenomenon, consider the prosecution of the police officers who were involved in the break-in at L'Agence de Presse Libre. The prosecutor chose to proceed on the less serious of the available charges and, at an in camera court session, he apparently joined with the defence in requesting leniency. Even if in the circumstances the prosecutor acted properly, large sectors of the public are bound to be suspicious. Few people can know what went on behind the closed doors of the courtroom but most people will know of the harmony of interest between the impugned police officers and the prosecutor's office.

Nor do civil court actions for damages appear as a very satisfactory avenue. Civil litigation is expensive, time consuming, and emotionally taxing. Negotiations for settlement, examinations for discovery, innumerable motions, trials,

and appeals could take years to produce results. Very few people have the resources to investigate the facts, engage counsel, withstand pressure by the police, and handle the many expenses which are so often involved.

While disciplinary complaints may be processed more expeditiously, the concern is that they will be handled less impartially. Since a finding of impropriety against a police officer could affect prejudicially the public relations of the entire force, such procedures are vulnerable to the suspicion of "cover-up".

A factor common to all these sanctions is the need for an initiative to be taken by the complainant or the police. For the reasons already indicated, police cannot be expected to initiate sufficient actions against police. And, for reasons already alluded to, such initiatives are not likely to be forthcoming from many complainants. As indicated, most of the grievances against the police will arise from among the least accepted sectors of society - minorities, criminal suspects, the disadvantaged, the politically unpopular, etc. Even if their complaints were meritorious, such people rarely would have the confidence to challenge the police. Indeed, surveys conducted by the Canadian Civil Liberties Association among such aggrieved people revealed that more than 85% refused to take subsequent retaliatory action. When asked about their reluctance, most of the grievors replied flatly,"it would do no good".[1] It is important, therefore, to consider the introduction of additional safeguards which would deal more effectively with the reluctance to take the initiative.

One possible measure might be the adoption of a broader exclusionary rule which would deny to the police the use in court of evidence which they acquired unlawfully. At least in those cases where their misconduct culminated in the prosecution of their suspects, the resulting sanction would be clear and conspicuous. The illegality of the methods involved would preclude the courtroom use of the evidence obtained. Such a sanction would require no special initiatives from other police officers or from the aggrieved party. Defence counsel could simply challenge the admission of any evidence which resulted from the questionable

activities of the police. This would force an inquiry at the trial into the legality of the police tactics. Perhaps even the mere knowledge that evidence so obtained could not subsequently be used, would act also as some deterrent against the contemplated misconduct. In this connection, note the recent statement of an Ontario crown attorney following the rather extraordinary trial of two Toronto police officers who had allegedly used illegal tactics to obtain a confession from a suspect. According to this prosecutor, so long as illegally obtained evidence is admissible in court, "these things are bound to happen".[2]

Admittedly, however, certain studies in the field have reached different conclusions. Some of them question how far the exclusionary rule really does deter police abuse. In any event, opponents of the rule think it is wrong to allow a guilty civilian to go free just because a police officer has also transgressed. In this view, <u>both</u> law breakers should be punished.

On the other hand, this view does not address the foregoing inadequacies in the alternate sanctions. As a practical matter, without an exclusionary rule, there is too great a risk that too little will be done about police abuse. The one thing that the law cannot afford is an appearance of tolerance or indifference about such practices. On balance, therefore, we believe that the Commission should recommend a broader exclusionary rule for Canada. At the very least, the courts should be empowered to suppress such evidence in those cases where its use would bring the administration of justice into disrepute. In this connection, consider the Evidence Code proposed in the December 1975 report of the Law Reform Commission of Canada.[3]

Even if such an exclusionary rule were seen as necessary, however, it could not be sufficient. Far too many of the apprehended police abuses occur in cases which will never culminate in prosecutorial action. This is particularly true of so much in the intelligence gathering exercise.

Effective redress in such cases will require that victims of police abuse have some opportunity for a publicly subsidized independent investigation of their grievances. In view of the fact that the only capacity for subsidized investigation is currently internal to the Force, it would be hard to expect any significant public confidence in the procedure. In this regard, we note the proposal of the Marin Commission of Inquiry for a federal police ombudsman.[4] In our view, however, the proposal does not go far enough to meet the problem for which it was designed. According to the plan, an independent ombudsman would be available to review the investigation of civilian complaints but the investigations, themselves, would continue to be conducted by members of the Force. This simply will not suffice to produce enough initiatives from aggrieved people. The availability of external review is not likely to make these people any more disposed to confide their problems to the colleagues of their antagonists. Accordingly, we ask this Commission to recommend a complaint system which provides for independent <u>investigation</u> as well as review.

Mechanisms of Control

But the prerequisite for a complaint is knowledge of the abuse. Unfortunately, many of the abuses will simply not be known to their victims. This is true, particularly in the security area where so much of the police activity is surreptitious. It is important, therefore, to go beyond the narrow issue of periodic retaliation and address the broader issue of everyday control.

In our particular brand of parliamentary democracy, such control is supposed to be achieved through the exercise of ministerial responsibility. According to the RCMP Act, for example, the management of the Force is legally subject to "the direction of the minister".[5]

During the last number of years, however, this concept of ministerial responsibility has undergone some rather far reaching restatements. No less an authority than Prime Minister Trudeau declared that he did not want to know and, indeed, he should not know the day to day operations of the police. In his view, the minister should be responsible only for the policy guidelines but not for the daily operations. At his press conference on December 9, 1977, for example, Mr. Trudeau was quoted as follows.

> "...it is not a matter of pleading ignorance as an excuse. It is a matter of stating, as a principle, that the particular minister of the day should not have a right to know what the police are doing constantly in their investigative practices..."[6]

The Prime Minister's theory is addressed to the danger of a politicized police force. The way to reduce this danger is to remove the minister's day to day control over police activities. But the problem with the theory is that it creates an insoluble conundrum. How can the minister ensure that the police are observing the policy guidelines unless he knows something of their day to day operations? Moreover, why is it necessary to choose between the minister knowing everything or nothing of the relevant operations?

In the absence of greater ministerial control, what practical protections would there be against police law-breaking? Mr. Trudeau has said that an aggrieved citizen can always seek redress in the courts.[7] But that is hardly a sufficient remedy. In our society, the private citizen is not supposed to carry the burden of protecting himself from criminal acts. Although he is entitled to take such initiatives, the primary responsibility for his protection in this area is supposed to be assumed by the police and the government. This theory of ministerial ignorance could effectively change the ground rules for our society.

In response to the problem of systematic law-breaking, the Prime Minister has said that a Royal Commission can always be appointed.[8] A further difficulty with both of these remedies is that they presuppose a knowledge in <u>someone</u> that police law-breaking has occurred. But again, since so many of the operations concerned are covert in nature, the requisite knowledge simply may not exist. If the aggrieved citizen cannot know and the minister is not supposed to know, who could possibly know enough to initiate the establishment of a Royal Commission?

The fact of the matter is that there can be no effective civilian control without <u>some</u> ministerial knowledge of the day to day police operations. There may be valid arguments concerning how much knowledge the minister should have and by what means he should acquire it. But a faithful application of the Prime Minister's theory would create a hopeless and unworkable situation. Unless the minister in charge had both a right to know and some practical access to what was going on, the police inevitably would become a law unto themselves. It would simply be impossible for the civilian authorities to exert any effective control over them. Paradoxically, the former Trudeau government piloted through Parliament a provision in the <u>Official Secrets Act</u> requiring the minister to authorize police interceptions of communications in the security area.[9] It is obviously impossible for the minister to play this role conscientously without knowing a <u>great deal</u> about the daily operations of the security service. In view of the fact that during 1976, for example, the minister reportedly issued 517 such warrants[10] (i.e. almost ten per week), he would have found it necessary either to contravene the doctrine of ministerial ignorance or his duty to scrutinize what he authorized.

This issue warrants the priority attention of this Commission. In addition to any questions of possible criminal complicity, the Commission should examine the exercise of political responsibility. To what extent have the cabinet ministers responsible for the RCMP discharged their duties in a manner which would have ensured the requisite civilian control? Should the various incumbents have known more than they claimed they did? Should they have harboured more suspicions, asked more questions,and exercised more supervision? Without adequate access to all the evidence which has been adduced before this Commission, we are in no position to attempt the answers to these questions ourselves. But we can and do urge the Commission to do this job. In our view, the Commission should both explicitly repudiate Mr. Trudeau's theory and then go on to evaluate how each of the ministers concerned exercised his political responsibilities. To whatever extent such ministerial conduct is found wanting, the Commission should make a specific finding to that effect.

But pronouncements on the past, while necessary, are not sufficient. Whether or not the ministers concerned are found wanting, new techniques must be devised to ensure that hereafter they will exercise the requisite control. Our approach must begin with the realization that, even apart from Mr. Trudeau's statements of the theory, many ministers may make an effort not to know things that could make their jobs more difficult. Without excusing any of the past incumbents, we believe that political considerations would be likely to inhibit ministerial knowledge in many areas. The more the ministers know,the greater the prospects of conflict with upper echelon officials. Thus, even for a minister who did not subscribe to the Trudeau doctrine, ignorance would appear to be a desirable state.

Our challenge is to devise machinery which will ensure that no minister hereafter will be able to retreat into ignorance. At the same time, however, Mr. Trudeau's concerns are not entirely devoid of validity.The object of the exercise is to promote the requisite ministerial knowledge <u>without</u> undue political interference.

In this connection, we would note again the Marin proposal for a federal police ombudsman. But we would expand on the role of this office. Contrary to the recommendations of the Love Committee,[11] the ombudsman should be given access to

all RCMP files and operations, including those in the security area. And, contrary to the recommendations of the Marin Inquiry itself, the ombudsman should not simply respond to complaints. He should also initiate them. Indeed, he should conduct an ongoing audit of RCMP operations, particularly in the security area. The findings from these audits should form the subject of periodic reports to the Solicitor General.

In that way, the minister's involvement in daily operations might focus on those cases where the ombudsman reported that there were apparent violations of law or policy. Instead of facing only the pressures emanating from the RCMP, the Solicitor General would then have to deal also with the competing pressures from the ombudsman. The resulting tensions would help to keep the minister from taking the path of least resistance. Indeed, the ombudsman should be required, within certain periods, to report to Parliament the existence, if not the details, of any outstanding differences between his office and that of the minister. In our view, the introduction of such a countervailing force could help to resolve the problem of the minister knowing too much or too little.

Among the questions which the ombudsman's audit should address are the following. Have the law and government policy been followed? Are the targeting practices of RCMP surveillance maintaining the appropriate distinctions between legitimate dissent and unlawful conspiracy? Has the RCMP selected the least intrusive methods of surveillance to accomplish its legitimate security goals?

In order to reduce the risks that the ombudsman might become too socialized by the officials he has to investigate, the auditing of the security service should be subjected to periodic in camera review by a small parliamentary committee whose membership would include opposition M.P.'s. While the Solicitor General would retain the legal power to use his own discretion in the resolution of any ensuing conflicts, he would be propelled politically to make compromises with those who are exercising these oversight functions. Such compromises might include the cessation of surveillance in some cases, the replacement of certain surveillance techniques by less intrusive ones in other cases, or perhaps in some cases even an agreement to allow a certain level of surveillance to continue for a limited period subject to report and review at a special meeting which could be convened earlier than otherwise slated. In view of the various interests, functions, and perspectives

involved in this process, the resulting compromises would probably strike as reasonable a balance as any alternate arrangements could hope to produce.

A word about some of the proposals to remove the security service from the structure of the RCMP. According to this idea, the security service would function as a virtually separate intelligence gathering unit with no law enforcement functions. We are not persuaded that such a reform would represent a significant improvement over the existing structural arrangements. Indeed, the whole thrust of our proposals throughout this brief is to tie the intelligence gathering function as closely as possible to law enforcement. In our view, a necessary protection for civil liberties is to require some discernible evidence of unlawful conduct as the triggering mechanism for security surveillance. While we do not postulate this as an absolute pre-condition, we do believe that it should represent the direction for surveillance activity to take. It would represent, therefore, a retrograde step to divorce security intelligence so completely from law enforcement.

The Educative Role of Government

One of the most important facets of civilian control is the political and social climate created by the government. The government's political posture can exert a profound impact on police behavior.

Of particular concern here are a number of government statements which were made at the time that the revelations of police wrongdoing began to tumble out of Ottawa. While acknowledging generally that the police must obey the law, these statements provided certain rationalizations for some of the misconduct at issue. At his press conference following the disclosure of the break-in against the Parti Quebecois, for example, Prime Minister Trudeau was quoted as follows:

> "What I am saying is that I am not prepared to condemn, you know, irremediably, the people at the time who might have done an illegal act in order to save a city from being blown up..."[12]

Mr. Trudeau reportedly went on to discuss the periodic justification for what he called "technical" breaches of the law:

> "Policemen break the law, sometimes, I suppose, when they drive 80 miles an hour in order to catch the guy who is escaping from a bank..."[13]

To invoke the inapplicable threat of mass destruction and the invalid analogy of escaping bank robbers is to encourage the inference that the government does not fully disapprove of the lawbreaking involved. Unfortunately, this impression was reinforced on subsequent occasions. At his press conference following the revelations of illegal mail interceptions, Mr. Trudeau was quoted as saying that he couldn't get "wildly excited" about these incidents of RCMP law-breaking.[14]

In order to ensure the survival of the fragile democratic processes, there must obtain in society an overwhelming consensus that the law should be obeyed. What concerns us about the statements we have quoted is that they risked a fracturing of that consensus. In saying this, we recognize the possibility that circumstances could arise where courts and prosecutors might properly absolve a particular offender. But, despite whatever mitigating factors might affect any particular case, it is the duty of the government to do everything possible to create an atmosphere which is inimical to the commission of offences.

In many respects, the political posture adopted by the government of the day represents the most dangerous aspect of the RCMP crisis. We believe, therefore, that the Commission's report should include a section explicitly criticizing these statements and calling upon future government leaders to be more mindful about the educational role of their position.

Indeed, the government should be admonished not only to avoid a harmful posture but also to adopt a helpful one. It is not enough to tell RCMP members, as many governments have done, that their job is to protect the security of Canada, even if there is a reminder that civil liberties must be observed. Somewhere in the RCMP mandates, instructions, manuals, and literature, the government should affirmatively propagate the values of democracy. The material should convey the message that the protection of personal privacy and political liberty is no less important than the maintenance of domestic tranquility. In this era of "affirmative action", the Government of Canada should stressmuch more vigorously the positive side of the democratic commitment.

THE TRAINING AND TREATMENT OF RCMP MEMBERS

Training

On Thursday, November 17, 1977, the Globe and Mail carried a letter attributed to one J.F. Thrasher, a retired superintendent of the Royal Canadian Mounted Police. The following is an extract from this letter:

> "Faced with a murder and a kidnapping, as well as the unknown intentions of the hostile Parti Quebecois and the FLQ, it was imperative that the identity of those involved and their objectives be determined. Subversion is an illegal activity and the participants exercise the utmost care to advoid detection..."[1]

What strikes us as significant here is that in the context of a discussion about subversion, this retired RCMP official talks about the FLQ and the Parti Quebecois almost interchangeably. In view of the raid against the Parti Quebecois, it appears that other members of the RCMP may have shared Mr. Thrasher's perceptions.

Unfortunately, the problem of misconception is not confined to the issue of separatism. As we noted earlier, former Solicitor General Warren Allmand admitted that the RCMP had conducted surveillance of farm leader Roy Atkinson and had infiltrated meetings of the National Black Coalition. According to Allmand, it will be remembered, there was a tendency in some sectors of the security service "to look upon any sort of opponent to the (Chilean) junta and supporters of Allende as being a subversive".[2]

Indeed this is one of the greatest concerns about police and security work - a tendency to ultra-conservative over simplification. Inherent in such a political orientation is a predisposition to perceive left-wing heretics as subversive conspirators. Whether this orientation is primarily an outgrowth of the excessive caution associated with security work or whether those attracted to security work are primarily those with such views, we cannot say. What we can say, however, is that this kind of political orientation produces bad judgments. It leads to needless surveillance, unfair job denials, and improper measures against legitimate political dissenters.

While we are as reluctant to suggest a political belief test for the security service as we would be for most other government jobs, we believe that a certain kind of political education might improve the performance of the security service. In response to the problem we have articulated, we would ask the Commission to recommend training programs which would sharpen the awareness of the crucial distinctions among the various political ideologies, particularly of the left. Early in their careers,

security officers should be exposed to the phenomenon of the democratic radical - the political ideologue who is deeply opposed to many of the practices in our society but is nevertheless committed to the democratic processes as the instrument of redress.

Of paramount importance in this regard is the distinction between the Parti Quebecois and the FLQ. Regardless of a shared belief in political independence for Quebec, these two organizations have been miles apart on the propriety of the means to accomplish their goal. While the FLQ has been prepared to use the bullet, the Parti Quebecois has confined itself to the ballot. Such distinctions must be impressed upon those who are engaged in security work.

Another example of this phenomenon is democratic socialism - the ideology which opposes the economic arrangements of capitalism but seeks to preserve the political institutions of democracy. Perhaps the training program could include seminar sessions with leading representatives of the New Democratic Party and the trade union movement. The commitment to democracy has led many Canadian social democrats and labour leaders into severe conflict with the totalitarian left. Moreover, the required and recommended reading list for trainees might include the writings of radical socialists from other countries. Consider, for example, Irving Howe and Bayard Rustin from the United States. For all their desire to transform American social and economic life, such writers insist on preserving the liberties in the United States Bill of Rights. Exposure to these kinds of people might help to counteract the dubious perceptions which appear to exist among sectors of the police and security service.

Another phenomenon to which these police personnel should be sensitized is the radical who, regardless of an undemocratic ideology, poses no threat to national security. Despite almost 40 years of surveillance against the Trotskyist U.S. Socialist Workers Party, American authorities have been unable to identify a single offence against the national security of their country.[3] Revolutionary theories, by themselves, do not constitute a sufficient basis for such surveillance. There must also be some assessment of dangerousness.

In our opinion, the training of security service personnel should include this kind of political component. The more sophisticated their political education, the less they will be likely to threaten the exercise of legitimate and lawful dissent. While

the Commission properly adresses itself to the availability of external controls and safeguards, there is no substitute for a security officer who understands more of the complexities with which he has to deal.

For such purposes, it would be wise to develop a policy of recruitment which would be more likely to produce the kind of constituency we are seeking. Greater emphasis should be placed on university graduates, particularly in the areas of politics and law. Current RCMP members should not have a necessary priority on vacant positions in the security service. Indeed, the kind of socialization they may have undergone through years in the para military RCMP might be less than helpful in developing the requisite sophistication for security activity.

Political sophistication is not the only area where the record indicates the need for improvement. Earlier in this brief, we noted numbers of situations where RCMP testimony before this Commission attempted to rationalize and justify conduct which was clearly unlawful. Certainly, it is necessary to provide all of the members of the security service with instruction in the basic components of the criminal law. But that will not suffice. What the foreoging testimony reveals is a lack of commitment to some pretty fundamental principles associated with civil liberties and the rule of law.

In more concrete terms, this means that the rights of suspects and potential targets must be accorded a higher priority in the supervision and training of RCMP members. This is not simply a matter of training officers to be more careful about over-stepping the line. It is also a matter of impressing upon them that their sworn duty to uphold the law includes the protection of those with whom they may come into conflict. Enforcement of law cannot be divisible. The use, by officials, of excessive force is just as unlawful, for example, as the use, by civilians, of illicit drugs. The police are no less duty bound to avoid the one than to pursue the other. Those who train and lead the police have the responsibility to convey this message in the clearest possible terms.

This means that the orientation effort must be comprehensive and ongoing. It must permeate every level of the officer's relationship with supervision - recruitment

selection, pre-service training, in-service training, promotion, demotion, discipline, etc. It should no longer be acceptable, for example, to impose voluntary transfers on officers who refuse to break the law when ordered to do so. Nor should government and RCMP officials be allowed, with impunity, to take refuge in some of the feeble rationalizations for police law-breaking which have surfaced at these hearings. In this connection, it would be appropriate for the Commission to identify the kind of testimony which reveals these leadership problems.

Again, the goal should be not simply the negative one of avoiding intrusions on civil liberties but also the more positive approach of promoting respect for them. Instead of simply seeking to eliminate personnel, materials, policies, and practices which violate civil liberties, there should be an affirmative effort to increase the libertarian orientation. In this connection, it might be useful to appoint an upper echelon official, perhaps in the Justice Department, whose special responsibility would involve the initiation of programs, throughout the federal government, for the promotion of the values contained in the Canadian Bill of Rights. As far as the RCMP is concerned, this official could be involved in developing policies for recruitment, training, promotion, and the preparation of mandates, manuals, and materials. The development of affirmative initiatives may well be helped through such adjustments in our institutional machinery.

Treatment

Finally, we believe that fairer treatment by police is more likely to be achieved when there is fairer treatment of police. In many crucial matters, RCMP members are denied the minimum level of legal safeguards which the humblest of Canadians take for granted.

At the moment, for example, members of the RCMP are legally subject to imprisonment on the basis solely of RCMP service trials. These internal trials are conducted in camera and the accused Mounties have no right to representation by outside counsel. Moreover, while the Mountie accused of a service offence need not testify at his trial, he is one of the few people in our society who can be jailed for refusing to answer questions in the context of closed police investigations.

Consider, for example, the case of Inspector Bernard Blier. According to his testimony, he underwent an interrogation of more than eight hours without access to legal counsel. Although he was advised that he had a right to remain silent, he was allegedly warned that this could lead to a major service offence under the RCMP Act. Mr. Blier says that, despite his explicit request for a lawyer, it was denied. He says also that he was not apprised of the specific conduct which precipitated the investigation of him; he was told only that he was being investigated for "conduct unbecoming a member of the Force".[4] Constable Richard Daigle[5] and Sergeant Paul Langois[5] told of similar experiences they had encountered when they were under investigation.

It is difficult to understand why the willingness to dedicate one's life to the service of one's country should be rewarded by the loss of the most fundamental civil liberties known to the common law democracies. Moreover, it is difficult to appreciate what public interest would suffer if the Mounties were accorded more of the concomitants of first class citizenship.

Accordingly, we would recommend that the power to impose terms of imprisonment be removed from members of the RCMP hierarchy. To whatever extent the offences in the RCMP Act are considered worthy of punishment by incarceration, adjudication should be rendered by tribunals independent of the Force and the Solicitor General's Department. Indeed, in the greatest number of cases, it would appear appropriate for this jurisdiction to be exercised in the ordinary way by the ordinary courts of law.

Moreover, like most other trials involving the threat of jail, trials under the RCMP Act should generally be conducted in an open forum. And, like most other accused people, the accused officer should be entitled to a free choice of counsel, including one from outside the Department and the Force. Where the refusal to submit to Departmental interrogation, under some circumstances, might justify employment discipline, it is difficult to conceive of the circumstances under which such conduct could justify physical confinement. On this basis, we would recommend the elimination of jail terms as a penalty for silence during such investigations.

But, even where employment discipline might be involved, it should be predicated upon specific notice to the officer of his impugned conduct and his right of access to counsel during the interrogation. And, since by the very nature of police work there is such exceptional vulnerability to accusations of a criminal nature, evidence which RCMP members must provide as a condition of their employment should be inadmissible against them in the event of a criminal prosecution. Whatever justification there might be for requiring and using the officer's statements in the context of employment discipline, there is no justification for such coerced material in the context of criminal prosecutions. Moreover, the accused Mountie under the RCMP Act should acquire the kind of protections against arbitrary arrest and pre-trial confinement which are currently available to the accused civilian under the Criminal Code.

At the moment, by virtue of both the RCMP Act and the common law, the RCMP Commissioner is virtually all powerful as regards the employment conditions of the members. Although we see no problem in the exercise by the Commissioner and his representatives of initiatory powers concerning employment conditions, we are troubled by the absence of proper review machinery. Under existing arrangements, if an RCMP member wished to question the propriety of a disciplinary suspension or discharge which had been imposed upon him, his only recourse would be to appeal within the Departmental structure.

Significantly, our society denies to RCMP members the most potent instrument of employment self help, the right to strike. Moreover, it appears that any form of independent union organization or attempt at collective bargaining would be unacceptable to the RCMP hierarchy. In the absence of some overriding public interest, elementary equity would require that, in view of the demands made upon the Mounties and the rights denied to them, they should enjoy at least a minimal measure of job security.

On this basis we would recommend that the members of the RCMP acquire the right of independent arbitration of their job-related discipline and discharge grievances. Until and unless their relations with their employers were governed by collective bargaining agreements, the arbitrator would be bound, of course, to judge the grievances according to the criteria in the statute and the regulations. But the existence of outside adjudication would introduce to the system at least some semblance of procedural fair play.

We recognize that a Bill introduced by a former Government in the House of Commons did attempt to provide some of the reforms which we are urging here.[7] Unfortunately, that Bill died on the order paper. In any event, it did not go far enough. We ask this Commission to recommend, therefore, all of the foregoing safeguards for the membership of the RCMP. In our view, they represent the minimum of what is required.

SUMMARY OF RECOMMENDATIONS

In summary, the Canadian Civil Liberties Association calls upon this Commission to recommend the following:

1. Subject to the kind of considerations which normally influence prosecutorial discretion, every RCMP officer and government official who broke the law should be prosecuted and/or disciplined.

2. The Federal Government should provide ex gratia compensation payments at least to those victims of RCMP law-breaking who sustained financial losses and/or legal expenses in respect of the Commission's proceedings.

3. The 1975 government mandate to the RCMP should be tightened in accordance with the ensuing recommendations addressed to the specific techniques of surveillance and action. Where such techniques are denied to the RCMP, no other federal agency should be allowed to employ them. Even where techniques are permitted to the RCMP, the consequent intrusions should be minimized as much as possible.

4. There should be a reduction in the electronic bugging power in the following ways:
   a) except for espionage committed on behalf of foreign powers, the authorization power in the Official Secrets Act should be repealed insofar as the use of such surveillance on citizens and permanent residents is concerned
   b) alternatively, such powers should be confined to those situations where there are reasonable grounds to anticipate, within the near future, resort to serious force or violence to impair the operations of government
   c) the bugging of foreign visitors should require reasonable grounds to suspect hostile intelligence activity on behalf of a foreign power
   d) the following procedural safeguards should apply to all electronic bugging
      i) a requirement of a prior warrant from a court or other tribunal independent of government
      ii) a requirement to report, for each bugging installation, the number of people overheard, the number of conversations overheard, the number of such conversations that can be described as incriminating, and, to whatever extent a special domestic intelligence power survives, the number of foreign to domestic bugging installations
      iii) subject to the possibility of renewal, the imposition of time limits on security bugging.

5. Subject to situations of imminent peril to life or limb and possibly the interception of contraband, there should be no new mail opening power
   a) alternatively, to open the mail of citizens and permanent residents there should be a requirement of reasonable grounds to suspect a serious security related breach of the law; in the case of foreign visitors, there should have to be reasonable grounds to suspect hostile intelligence activity on behalf of a foreign power
   b) alternatively, the mail of citizens and permanent residents should be immune from such interceptions unless, at the very least, there are reasonable grounds to anticipate, within the near future, the resort to serious force or violence to impair the operations of government
   c) to whatever extent this country legalizes mail opening, the following procedural safeguards should apply:
      i) prior warrants from a court or other independent tribunal
      ii) letter by letter permission
      iii) alternatively, subject to a possibility of renewal, statutory time limits on the length of security surveillance
      iv) more comprehensive reporting, including distinctions between foreign and domestic surveillance, the number of people surveilled, the number of communications intercepted, and the number of such communications which are incriminating
   d) surveillance by mail covers should require the kind of standards and procedures which are proposed for electronic bugging.

6. Subject to situations of imminent peril to life or limb, the power of entry, search, and seizure should be reduced as follows:
   a) writs of assistance should be abolished; prior judicial warrants should be required for all such forcible entries
   b) individuals found in such places should not be subject to involuntary search unless there are reasonable grounds to suspect them of misconduct
   c) apart from electronic bugging, surreptitious entries should be rendered unlawful in the domestic security area
   d) in the foreign area, surreptitious entries should require, in the case of citizens and permanent residents, reasonable grounds to suspect a serious security related breach of the law and, in the case of foreign visitors, a reasonable suspicion of hostile intelligence activity on behalf of a foreign power. Procedurally, such entries should require prior warrants from a court or other independent tribunal
   e) even in the case of imminent peril to life or limb, those who enter without warrant, should be required subsequently to demonstrate a reasonable belief that the imminence of the peril left no time to obtain a prior warrant.

7. Security Service targeting of informers and infiltrators at citizens, permanent residents, and groups composed of such constituencies should require reasonable grounds to anticipate a serious security related breach of the law within the near future. In the case of foreign visitors, there should be reasonable grounds to believe that, within the near future, there will be hostile intelligence activity on behalf of a foreign power. In view of the special hazards involved, the following protective measures should apply:

a) the deployment of informers should require the early approval of the highest level of the RCMP's security service
b) after a few months, the continuation of such informing should require the approval of the Solicitor General
c) the informer's participation in unlawful conduct during the course of an infiltration should require the advance approval of RCMP headquarters and it should be subject to the most stringent regulations including, but not limited to, the following:
   i) a bar against violence and even the instigation of non-violent illegalities
   ii) a requirement that it be necessary to shield the informer's cover and that it be of a clearly lesser magnitude than the activity under surveillance
d) even as regards conduct which is not necessarily unlawful, the following safeguards should apply to the informer's activities:
   i) the informer must not interfere unduly with the lawful conduct of those against whom he is reporting
   ii) no commissions should be paid to an informer for the frequency or weight of information conveyed
   iii) every effort must be made to avoid intruding on privileged communications and, in any event, they should not be disseminated further
   iv) in the event that any informer becomes a witness in a trial, full disclosure must be made to the judge and jury concerning the informer relationship and the amount paid for the service
   v) to the extent that an informer provoked a violation of the law in circumstances where there may be a reasonable doubt that it would otherwise have occurred, the person so provoked should be entitled to a defence of entrapment
e) as far as RCMP recruitment of informers is concerned, the following safeguards should apply:
   i) there should be no resort to pressure through the dissemination of personal information about the potential informer
   ii) in the event that prosecutions are used to coerce informers unfairly, the courts should regain the power to stay proceedings for abuse of process.

8. RCMP access to income tax data should be governed according to the following guidelines:
   a) subject possibly to imminent peril to life or limb, there should be no investigatory access; even for tax enforcement, RCMP officers should not be used as "authorized persons"
   b) in the case of non-tax "criminal proceedings", access should require a subpoena, prior notice to the target, an opportunity for the target to make representations in court against access, and a decision by the court that the requested access is necessary to the proceedings.

9. Security service investigations by the use of less intrusive techniques such as watching, trailing, interviewing, and source checking should require discernible standards and, within a reasonable period of the investigation's inception, RCMP headquarters should be required to review it with a view to renewing it for additional periods, intensifying it with more intrusive techniques if the facts so warrant, or terminating it completely.
10. As far as deterring, preventing, and countering are concerned, the law in this country should move in the direction of prohibiting "dirty trick" and COINTELPRO type activities in the domestic arena and imposing additional restrictions in the foreign arena.
11. The RCMP's retention and dissemination of personally identifiable information should be restricted as follows:
    a) no retention or dissemination beyond what is relevant for authorized security or law enforcement purposes
    b) after the lapse of certain time periods (less for domestic than for foreign purposes), data not so relevant should be destroyed
    c) the existing statutory right of access which people have to government files about themselves should be amended at least as follows:
        i) the exemptions for law enforcement and national security should require that disclosure could be expected to harm these interests
        ii) the term "national security" should be replaced by other terminology more precisely expressing the interests to be protected, such as, for example, "physical safety and defence"
        iii) government attempts to withhold material should be subject to review and reversal by the courts or some other independent tribunal which would have access to all the material at issue.
12. By way of policing the police, the following measures should be adopted:
    a) render inadmissible in court any illegally obtained evidence, at least in those situations where its admission would tend to bring the administration of justice into disrepute
    b) repudiate the notion that ministers should not have a right to knowledge of the RCMP's daily operations and assert instead the principle that some such knowledge is indispensable to effective civilian control
    c) evaluate how each of the affected ministers, in fact, exercised his political responsibility to maintain the requisite control
    d) establish a federal police ombudsman, independent of the RCMP and government, to investigate civilian complaints against the RCMP and to conduct an ongoing audit of the security operations
    e) require the periodic reporting of these audits to the Solicitor General and, if disagreements result, require the ombudsman to report their existence, if not the details, to Parliament
    f) establish a small parliamentary committee, including opposition M.P.'s, to review the ombudsman's audit
    g) resist the proposals to separate the security service from the RCMP
    h) criticize those government statements which have tended to justify RCMP law-breaking and admonish future governments to be more mindful about the educational role of their position.

13. In the training and treatment of RCMP members, the following measures should be adopted:

a) expose them to material and instruction which will sensitize them to the phenomenon of democratic radicalism
b) expose them to material and instruction which will sensitize them to the phenomenon of undemocratic but non-dangerous ideologies
c) in the RCMP policies with respect to training, promotion, demotion, transfer, and discipline, accord a higher priority to the rights of suspects and potential targets
d) identify the kind of government and RCMP testimony which reveals leadership problems with respect to the rights of targets and the rule of law
e) undertake a more affirmative effort, throughout the RCMP and the government at large, to promote the values contained in the Canadian Bill of Rights
f) provide that RCMP members will no longer be punishable by imprisonment for maintaining silence during closed Departmental investigations
g) provide that where they are required to answer interrogations as a condition of employment, RCMP members be accorded the following rights:
   i) prior notice concerning the substance of any accusations against them
   ii) a reasonable opportunity for consultation with counsel
   iii) a prohibition against the use of such statements in the event of a prosecution
h) provide that RCMP members will acquire the kind of protections against arbitrary arrests and pre-trial confinements which are available to accused civilians under the Criminal Code
i) provide that accused RCMP members will be entitled to a free choice of legal counsel, including one outside of the Department
j) provide that RCMP members will no longer be punishable by imprisonment, unless there is adjudication, independent of the RCMP and the government
k) provide that RCMP members will have a right to the independent arbitration of their job-related discipline and discharge grievances.

NOTE

In order to cover possible loopholes in these recommendations, it should be understood that whenever a set of circumstances is sufficient to authorize a particular technique of surveillance, such technique would also become permissible in respect of a higher threshold circumstance. For these purposes, we set out here the generic categories of such circumstances in order from the highest to the lowest thresholds.

1. Imminent peril to life or limb.
2. A serious security related breach of the law such as treason, sabotage, espionage, or the employment of serious violence to impair the machinery of government in Canada.
3. No evidence of law-breaking now but reasonable grounds to believe that, within the near future, there will be such a security related breach of the law.
4. There is no law-breaking now but there are reasonable grounds to suspect hostile intelligence activity on behalf of a foreign power.
5. There is no law-breaking now but there are reasonable grounds to anticipate such foreign intelligence activity within the near future.

It should also be understood that breaches of the law include what has passed, what is present or ongoing, and what is imminent.

APPENDIX -

THE SURREPTITIOUS ENTRIES

PRE- 1974

To a very great extent, the government and RCMP testimony on surreptitious entry has relied upon the "breaking and entering" sections of the Criminal Code. The argument has been that the impugned RCMP officers lacked the requisite intent to commit indictable offences on the premises they surreptitiously entered. It is probably true that in the greatest number of these cases there was no intent to commit theft. It is not as clear, however, that they lacked the intent to commit other indictable offences.

Consider, for example, the mischief section of the Criminal Code. That section would penalize a person "who wilfully....interferences with the lawful,... enjoyment...of property".[1] In our view, there is at least an arguable basis to believe that the planting of listening devices and the scrutinizing of personal papers constitute an interference with the enjoyment of the property in question. Since the offence is capable of prosecution by indictment, those who broke into premises with the intent to commit it might thereby be guilty of breaking and entering with the intent to commit an indictable offence. And, to the extent that they were successful in monitoring conversations and inspecting documents, they might be guilty also of breaking and entering and committing an indictable offence. By the same reasoning, they might be guilty of the offence of mischief, even apart from the breaking and entering. Moreover, the mischief offence might be applicable to any of the officers who, in the course of conducting a surreptitious entry, "willfully" damaged property.[2]

Consider also the offence of possessing instruments "suitable for house breaking... under circumstances that give rise to a reasonable inference that the instrument has been used or is or was to be used for house breaking...". The scope of this offence is not limited to dwelling houses but is referrable to virtually any place. Arguably, any surreptitious entries involving such devices might be construed as a violation of this section. It appears from the evidence that on numbers of occasions lock technicians were used to gain entry into the premises in question. Presumably they carried the appropriate tools. Indeed, the carrying of burglar's tools was expressly admitted in those very terms.[3] Of course, the Criminal Code section on this matter requires that the possession be

"without lawful excuse". In the absence of some explicit legal authorization, it would appear very difficult, however, to establish a lawful excuse for the kind of uses which these devices served in these cases. Moreover, the difficulties of anyone charged under this section would be compounded by the fact that the onus is on the accused to justify his possession. In any event, the question of "lawful excuse" would not likely affect the existence of at least a prima facie case.

These surreptitious entries might also be in violation of the trespass statutes of many provinces. While the limitation periods for prosecution under these statutes could well have expired by now, much of the conduct at issue might nevertheless be prosecutable under the Criminal Code. To the extent that these surreptitious entries resulted from the planning of two or more people, they might be susceptible to the Criminal Code offence of conspiracy "to effect an unlawful purpose".[4] Our courts have already held that such unlawful purposes can include breaches of provincial statutes.[5] In the written opinions of Federal Assistant Deputy General Attorney General L.P. Landry and B.C. Deputy Attorney General R.A. Vogel, the English case of Kamara v D.P.P.[6] was cited to suggest that this conspiracy section of the Code might not apply to the RCMP's surreptitious entries. It appears, however, that these government opinions have not adequately considered the fact that the Kamara case was dealing with conspiracy to commit the civil tort of trespass. In England, there is no counterpart of the concept of conspiracy to breach a quasi criminal provincial statute. Moreover, the Kamara case also recognized that even where the tort of trespass is concerned, there could be a criminal conspiarcy in the event that "the public has sufficient interest". It might well be argued that organized trespass by the public police is a sufficient invasion of the public interest to come within this reasoning in the Kamara case.

The foregoing are listed only to indicate a range of possible offences that might bear upon the conduct in question. A more complete list and more definitive opinion would require a more thorough investigation of the evidence and the law than we have been able to perform. In any event, even if technical obstacles such as statutory limitations might pose a handicap to prosecution, much of the

impugned conduct must nevertheless be regarded at least as presumptively unlawful. The inability to wage a successful prosecution cannot endow the conduct with legitimacy. Nor does prosecution necessarily exhaust the state's ability to vindicate the laws which were broken. It is still possible to impose disciplinary measures on the participants who remain in the RCMP and government.

NOTES

Public Protection and Civil Liberties - The Problem of Ends and Means

1. Report of the Royal Commission on Security (Abridged), Ottawa,(1969), (Ottawa, Queen's Printer), p.5 (McKenzie Commission).
2. Ibid.

RCMP Law-Breaking and The Public Interest

1. Certain other misdeeds such as the break-in against L'Agence de Presse Libre, of course, did result in prosecution. But they predated that crucial final weekend of October,1977,when the break-in against the Parti Quebecois was revealed. It was at that point that the bulk of allegations and revelations began to tumble out of Ottawa.
2. Regina v. Dass 47 CCC(2d)194.
3. Globe and Mail, 3 May 1979, p.1.
4. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (hereafter referred to as the McDonald Commission). Testimony of John Starnes, Vol. 100, pp.15970-3 of transcripts.
5. McDonald Commission transcripts, Vol.78, pp.12645-6, 12714.
6. Ibid, Vol.8, pp.13232-3.
7. Ibid, Vol.8, p.1077.
8. Ibid, Vol.84, pp.13772-13777.
9. Ibid, Vol.103, pp.16228-9. (Starnes).
10. Ibid. Vol.84, pp.13756-8; Vol.88, pp.14460, 14463; Vol.101, pp.16081-3, 16090-4; Vol.103, pp.16308-9. (Testimony of Mr. Higgitt and Mr. Starnes).
11. Ibid, Vol.85, p.13963.
12. Ibid, Vol.33, p.5447.
13. Ibid, Vol.64, pp.10450-1, 10493-4.
14. Ibid, p.10459.
15. Ibid, Vol.81, p.13321.
16. Globe and Mail,3 May 1979, p.1.
17. Globe and Mail,31 October 1977, p.7.
18. There is an arguable basis to think that Canadian law might now permit forcible entry, without judicial warrant, in such emergency situations. Section 27 of the Criminal Code, for example, empowers anyone to use as much force as is reasonably necessary to prevent the commission of an offence for which an individual could be arrested without warrant and that would be likely to cause immediate and serious injury to the person or property of anyone. Consider also the common law defence of necessity. In this connection, see Criminal Law by Mewett & Manning (Toronto: Butterworths, 1978), p.305:
"It is suggested that, on the very few authorities that are available, the defence of necessity does now exist in Canada and that the limitations are as follows. Where an accused believes upon reasonable and probable grounds that serious harm will befall himself or some other person, he is justified in committing a criminal offence to avert that harm if there is such an emergency that no other course of conduct is reasonably possible in order to prevent that harm; but this defence does not apply where the offence committed gives rise to more serious harm than that sought to be prevented."

19. Ibid.
20. Surreptitious Entries of the Royal Canadian Mounted Police in British Columbia (1972-1976). Report prepared at the request of The Honourable Garde B. Gardom, Q.C., Attorney-General for British Columbia, by Richard H. Vogel, Deputy Attorney-General for British Columbia, December 11, 1978.

The General Susceptibility to Surveillance

1. Address by the Honourable J.C. McRuer given at the Conference on Law and Public Affairs at the University of Toronto, February 3, 1978, p.13.
2. McDonald Commission transcripts, Vol.116, p.17894.
3. Ibid, Vol.115, p.17773.
4. Ibid, Vol.117, p.18106.
5. Ibid, Vol.114, pp.17541-2.
6. Ibid, Vol.115, pp.17765-6.
7. Ibid, Vol.116, p.18009.
8. The quoted remarks were provided to us by Mr. Copeland from a tape recording which he reportedly made with the permission of the Security Service officer involved.
9. Record of Cabinet Decision at meeting of March 27, 1975. "The Role, Tasks and Methods of the RCMP Security Service".
10. See, for example, Re United Glass and Ceramic Workers of North America et al and Domglas Ltd. et al 85 D.L.R.3rd 118 (1978) (Ontario).
11. Criminal Code 1953-54, c.51, s.423(2)(a). The courts have held that a breach of a provincial statute could constitute an unlawful purpose under this section. See, for example, R. v. Wright (1964) 2C.C.C.201 and R. v. Layton Ex. p. Thodas (1970) 5C.C.C.260.
12. Official Secrets Act, R.S.C.1970, 0-3. s.16.
13. U.S., Congress, Senate, Final Report of The Select Committee To Study Governmental Operations With Respect To Intelligence Activities, Report No.94-755, 94th Congress, 2d Session, 1976, Book II, p.19.(Hereafter referred to as the Church Committee Report).
14. Church Committee Report, p.19.
15. Ibid, p.359.
16. Ibid, p.19.
17. Ibid.
18. Ibid.
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20. U.S., Attorney General, Attorney General's Guidelines for FBI Domestic Security Investigations, March 10, 1976 (Issued by Attorney General Edward Levi). For a critique on the alleged over-breadth of these guidelines, see Controlling the FBI, ACLU Testimony on Charter Legislation Before the Senate Judiciary Committee, April 25, 1978.
21. Church Committee Report, p.320, (Recommendation 44).
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29. Ibid, p.15.
30. Ibid, p.16.
31. Ibid, p.15.
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36. Australia, Parliament, Report of The Royal Commission on Intelligence and Security, Fourth Report, Volume 1, 1977, p.253. (Hope Commission).
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11. FBI Annual Report, Fiscal Year 1968.
12. "The Challenge of Crime in a Free Society", 1967, (Washington: U.S. Government Printing Office), p.198.

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15. U.S., National Wiretap Commission Report, p.193.
16. Ibid.
17. U.S., Congress, Senate, Select Committee on Intelligence, Electronic Surveillance Within the United States For Foreign Intelligence Purposes, Hearings before the Subcommittee on Intelligence and the Rights of Americans, 94th Cong., 2nd Sess., 1976, p.113.
18. Schwartz, Herman, Taps, Bugs, and Fooling the People, (Published by The Field Foundation, 100 East 85th Street, New York, N.Y.,June 1977), p.39.
19. Elliff, Reform of FBI Intelligence Operations, p.41.
20. Schwartz, Herman, Taps, Bugs, and Fooling the People, (Published by The Field Foundation, 100 East 85th Street, New York, N.Y.,June 1977), p.40.
21. Ibid, p.39.
22. Church Committee Report, p.13.
23. In the case of United States v. United States District Court 407 U.S. 297 (1972) the Supreme Court of United States held that there is no executive power to authorize electronic surveillance in internal security matters without prior judicial approval. While the Court indicated that Congress could enact legislation authorizing such surveillance no such legislation has ever been passed.
24. Omnibus Crime Control and Safe Streets Act, Title III,18U.S.C.§ 2516.
25. McDonald Commission transcripts, Vol.10, p.1359. This is our translation of the testimony in French which reads as follows: "beaucoup moins qu'auparavant".
26. Official Secrets Act, s.16.
27. Foreign Intelligence Surveillance Act of 1978, Title I, sec.101-102.
28. Ira S. Shapiro, "The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendent", 15:1 Harvard Journal on Legislation 119 at p.173.
29. Foreign Intelligence Surveillance Act of 1978, Title I,Sec.101-102.
30. Criminal Code. 1953-54, c.51, s.178.22.
31. 18 U.S.C. § 2519.
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33. McDonald Commission transcripts, Vol.84, pp.13772-7.
34. Ibid.
35. Canada, Parliament, Bill C-26, House of Commons of Canada, Thirtieth Parliament, Third Session, 26-27 Elizabeth II, 1977-78.
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37. Ibid, Vol.6, p.782 (Sexsmith). Since the rescission of the authorizations, no more than 2 mail openings have come to light.
38. Canadian Bill of Rights, 8-9 Elizabeth II, c.44, s.1(a).
39. Report of the Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, by John A. Pringle, Commissioner, (Ontario Queen's Printer, January, 1975).
40. Ibid, p.68.
41. Narcotic Control Act,R.S.C. 1970, Chapter N-1, s.10(1). A close reading of this section suggests the possibility that the power in question might not even require reasonable grounds. See the Pringle Report (n.39), p.58. Canada's other major drug law, the Food and Drug Act, R.S.C. 1970, Chapter F-27, contains an identical provision in section 37(1). Similar entry and search powers can be found in the Excise Act, R.S.C. 1970, Chapter E-13, s.70.

42. Report of the Royal Commission on the Conduct of Police Forces at Fort Erie on the 11th of May, 1974, p.57.
43. Narcotic Control Act, s. 10(1) and (3); Food and Drug Act, s. 37(1) and (3); Customs Act, R.S.C. 1970, Chapter C-40, ss. 139 and 145; Excise Act, ss.76 and 78.
44. Levitz v. Ryan 9CCC 2d 182.
45. Criminal Code, s.443.
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47. Official Secrets Act, s.16(2).
48. Elliff, Reform of FBI Intelligence Operations,p.71.
49. 18 U.S.C. §§ 2516 and 2518.
50. Globe and Mail,31 October 1977, p.7.
51. Church Committee Report, p.13.
52. First Principles, published by Project on National Security and Civil Liberties, March, 1977, Vol. 2, Number 7, p.4.
53. Ibid.
54. Ibid, p.3.
55. Hoffa v. U.S. 385 U.S. (1966) at p.302.
56. GAO Report, Nov.9,1977, p.14.
57. It is beyond the scope of this brief to address the problem of informers and infiltrators for ordinary criminal law enforcement.
58. McDonald Commission transcripts, Vol.84, pp.13756-8; Vol.88, pp.14460, 14463; Vol.101, pp.16081-3, 16090-4; Vol.103, pp.16308-9. (Testimony of Mr. Higgitt and Mr. Starnes).
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63. McDonald Commission transcripts, Vol.47, p.7547.
64. Ibid, Vol.51, p.8261. (Kozij).
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66. Ibid, Vol.50, pp.8039-40. (Pobran)
67. Ibid, pp.8030-1.
68. Ibid, Vol.51, p.8273. (Kozij).
69. Ibid, Vol.50, p.8047-8, 8122.
70. Ibid, Vol.50, p.8012; Vol.51, p.8295.(Pobran and Kozij).
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6. McDonald Commission transcripts, Vol.65, p.10732. (This document was a letter of instructions from Assistant Commissioner Parent in July, 1971, filed as Exhibit D-7 with the Commission).
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9. Elliff, Reform of FBI Intelligence Operations, p.128.
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12. GAO Report, Nov.9, 1977, p.34.
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14. Criminal Code, s.27.
15. See note 18 for the section entitled "RCMP Law-Breaking and the Public Interest".
16. American Civil Liberties Union submission on the National Intelligence Reorganization and Reform Act (S.2525),presented to the U.S. Senate Select Committee on Intelligence on July 18, 1978, p.37.
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4. Canada, Department of the Solicitor General, The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police, 1976, Part IV. (Marin Commission).
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